

THE CONTRADICTIONS OF LABOUR AND THE LEGAL REGULATION OF EMPLOYMENT

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DECLARATION

As provided by article 46.7 of the Postgraduate Degree Programme Regulation, I hereby declare that the thesis has been composed by me, that it is entirely my own work and that it has not been submitted for any other degree or other professional qualification.

Yours sincerely ,

Abstract of Thesis

The theme of this thesis is the contradictory character of labour and employment as it occurs in modernity. In this respect the thesis starts with the phenomenological reading of labour as it is expressed in its relation to property in the employment relation. The point that the thesis makes is that employment in capitalism is a dialectical relation of conflict and interdependence that cannot be reduced in terms of exchange. This relation despite the efforts to the mutation of its substance by the market and the suppression of its conflictual character by the welfare state persists in its ambivalent character and is expressed as a paradox in the complexity of its practice in modernity. The thesis suggests an understanding of employment that recognises it as power relation that creates relations that are very similar in their normative logic to those of a political community. The aim is by unveiling the complexity of the relation to strive for a legal understanding that whilst socially tames and conditions domination allows the normative potential of employment to be legally expressed.

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Introduction

The subject of this thesis is labour. The first question that confronts us is why the issue of labour should invite us to theorise about it. There have been theories that tell us that the question of labour is obsolete and that in the post-modern, post-industrial society that we currently live in the significance of employment has been diminished¹. Although these positions purport to describe actual social transformations that are occurring in late modernity and affect the structure of employment they do not take into account what employment actually is. They talk about the transformations of labour and employment without thinking what these concepts actually represent. Normative interpretations although autonomous in the development of their logic and to their field of application have to be based on a solid cognitive basis if they are to be relevant². In this respect we have first to understand what we are dealing with before we apply any normative solutions to it. In order to understand labour and employment will go back to discuss the intimate/constitutive relation between labour and the self. We then proceed to look at how this relationship is (mis-) investigated in law.

Our starting point is that that labour will always be fundamental and socially relevant as it expresses an invariable constitutive factor for human society. This thesis assumes that labour creates a fundamental relation between humanity and nature that subsequently plays a major role for the creation of the terms of human symbiosis. As such this relation cannot be 'surpassed' or diminished since it expresses a fundamental way through which we, as humans, relate both to nature and with to ourselves. Our other main point is that labour in modernity is conditioned by its relation to property, a relation that determines the substance of employment within the context of capitalist property relations. What I am going to argue is that this relation is a relation that cannot be sublated within capitalism. It is a structural relation that determines the substance of the relation of employment, a substance that finds no expression in the dominant legal paradigms of our time.

¹ Rifkind (1997), Bell (1974) et al.

² The dependence of the normative to the cognitive does not in any way deny their existence as distinct, irreducible to each other discursive genres. As we are going to argue further on their relation is one of interaction and not of determination. For an influential account on the relation between cognition and normativity see Gadamer (1975) pp. 324-341.

The thesis will start with the analysis of the basic components of the employment relation. This means that it starts with the questions of what is labour, what is its relation to property and what is the role of this relation for the creation of the social institutional order. Our guiding thread will be the antithetical ways this has been understood by Locke and Hegel. The reason for this is that these two thinkers have provided us with two opposing paradigms as to the understanding of employment; one that puts emphasis on the result of labour as property and one that emphasises its character as an attribute of the social self³. And despite the opinion of theorists like Châtelet and Pisier-Kouchner who have said the two paradigms are complementary rather than opposed to each other as rational systems of authority in modernity⁴, we are going to see that in what concerns employment they substantially differ both as to their understanding of the relation and as to its normative regulation. In this respect we will see that Locke's logic subsumes labour under property whereas Hegel's although it does not deny it, subsumes it under the overarching control of the state. This creates two different normative logics, crudely, the one focusing on the economic dimension of employment, the other on its social dimension. It is for these reasons that we focus on Locke and Hegel and not so much on Marx. Marx was undoubtedly the greatest philosopher of labour in modernity. However, although Marx building on Hegel was the first to advance the idea of labour as the most basic element for the constitution of both man and society, he mainly focused his critique on the issue of labour domination and its revolutionary overcoming. And it is exactly because of this 'revolutionary overcoming' that this thesis will not discuss Marx except in passing, as it locates its inquiry within capitalist property relations. We thus look for a plausible understanding for the ambiguities and tensions of employment in capitalism and not beyond. In this respect he provides us with a valuable instrument of critique that sheds light into the ambiguities that the relation between labour and property creates.

The analysis of these two models in the light of Marx's critique will show that employment is a multileveled relation. It is a power relation that is based on the domination of property over labour, a condition that suppresses the substance of labour as a fundamental expression of human creativity and as a constitutive factor of

³ On the different logics of these two approach in what concerns the modern theory of the state see Châtelet and Kouchner (1982) pp. 127-130.

⁴ Ibid. pp. 130-131.

the social self. Under the paradigm of property and the logic of free exchange of commodities as sanctioned by capitalist law, labour loses its intrinsic normative significance. Despite the attempt of Hegel to preserve the integrity of the worker (it should not be forgotten that it was Hegel the first who analysed the major significance of labour for humanity) the logic of exchange that underlies the logic of capitalism cannot possibly be overcome. Exchange in capitalism is exchange of equivalents. Labour has to be equivalent to property, has to be interpreted in terms of property if it is to be exchanged at all; and this is a condition that Hegel's safeguards could do nothing about. However this relation of domination is also a relation of interdependence in the sphere of permanence. This is why the paradigm of exchange apart from generating oppression, is also reductive. First of all it assimilates employment to a simple market transaction. In this respect not only does it disregard its social character, not does assimilate it to market rationality, it erases its characteristic as a relation between different principles that have to cooperate under ambiguous terms under conditions of complexity. However, despite its subsumption under the logic of exchange the social character of labour cannot be elided or negated. What are these premises and how are domination and conflict conditioned by the fact of the interdependence of the parties?

Interdependence is conditioned by the fact of continuous dependence. It is conditioned by the dependence of property on labour in the act that domesticates nature and makes it an object of domination and by the need of labour to subsist and reproduce itself within the confines of a society that understands labour as an intermediate between itself and the appropriation of externality. Conflict, domination and interdependence are structural conditions of employment that cannot be grasped by the reduction of employment to a relation of exchange. They eventually stem from the substance of labour and as such cannot be elided by any normative paradigm. They will always reappear as they belong to employment as a structural condition. Employment as a relation of conflict and interdependence creates a legal impasse, a relation that our legal concepts cannot contain and handle. It creates notions and relations that do not fall within the abstractions of freedom and equality as the latter provide the cornerstones of our legal culture.

The great paradigms of liberalism and welfarism that in a competing way determine our understanding of employment focus only on certain aspects of the relation. They do not aim at comprehending it in its complexity. However, as they

provide us with the main definitions as to the content of employment as a legal relation we have to address them in order to be able to overcome them.

For this in chapter two we will turn to the liberal tradition (of which Locke is one of the most prominent forefathers) and to its recent revival in neo-liberalism. There we are going to address the development of the first strand of the perceptions of employment in modernity, namely the one that understands it as a relation of economic exchange. Liberalism is not just an ideology. It is a deep-seated perception that departs from the relation of man to nature as one of domestication and has as a result its commodification. Capitalism eventually wants to own nature so that it can buy it and sell like any other commodity. In this respect the successors of the early, radical liberalism provide us with a paradigm of employment that is based on a series of abstractions that stem from a supposed rational primacy of the economic orientation of social action. What I am going to argue is that this perception is based on ideological assumptions that totally ignore the substance of employment as an ambivalent relation. Neo-liberalism subsumes all social relations under the notion of free, competitive exchange, as it perceives it as the primary vehicle of social evolution. In this respect we have to deal with not merely a perception of employment but more generally with a social perception that situates employment within a certain social and anthropological understanding. What we are going to argue is that this understanding is strongly ideological and morally unjust. The neo-liberal model of employment not only disregards its ambivalence and the ambiguities and tensions that it creates, it violently suppresses them. Under its precepts employment is solely a market relation; its complexity is mis-recognised. Our final point will be that despite its increasing influence this paradigm has to be rejected on the basis of the unacceptable results that its normative approach creates.

After dealing with the strand of the liberal and neo-liberal currents of thought in chapter two, in chapter three we will turn to a tradition that in the last instance derives its legitimation from the same source that sees the State as the overarching principle that encompasses in its rationality all social relations. Under this perception employment is no longer perceived as a private economic relation between individuals but is rather recognised as a relation of paramount social significance and as such is placed under the legal aegis of the State. The welfare state did not try to understand employment as a relation of domination and alter its character. What it rather did, was to try through the medium of law to control its social consequences. In

assessing the model we can say that the intervention of the welfare state while undeniably beneficial to the improvement of the condition of the working class came at the cost of suppressing the conflictual aspect of employment and of subjecting the dynamics of social action as expressed through labour movements to the authority of the State.

In the last chapter we deal with the way that these ambiguities and tensions and these competing definitions and perceptions are expressed in the actual legal practice of employment in modernity.

In this respect we deal with the social organisation of labour as expressed in the paradigmatic form of the modern corporate phenomenon. Under the competing yet complementary notions of contract and organisation we see employment as a relation of conflict and interdependence between labour on the one hand and property and technological knowledge on the other. In it we can see the ambivalence of employment unfolding creating ambiguities and tensions as they are expressed not just in the relation between property and labour but as they are translated in relations between social forces, rationalities of action and discursive genres that compete on the basis of the imperative of their cooperation. This relation creates an institutional pattern that in a sense reproduces the structure of the relation not through the medium of exchange but rather through the assumption of a rationality that is political in its substance. This means that our suggestion does not offer a magic formula that its application would solve the problems of employment. Instead we can unveil and unfold these paradoxes and try to discover a normative approach that recognises their multiplicity. An approach that socially conditions the aspect of property domination over labour and finally allows the dynamics of the relation to express themselves and not to be heteronomously determined by the authoritative definitions of organised systems of power such as the market and the state.

CHAPTER ONE

THE NATURE OF THE RELATION OF EMPLOYMENT

Political economy starts from labour as the veritable soul of production and yet it attributes nothing to labour and everything to private property.

(Marx)¹

Introduction

The purpose of this chapter will be to explore the nature of the relation of employment as it exists in modernity, try to demonstrate its ambivalent character and eventually attempt to bring to the fore the underlying tensions and ambiguities that this ambivalent character creates. In order to do this, we will first have to probe the basic philosophical principles that provide the groundwork upon which the modern understanding of labour is constructed.

Our first task will be to delineate the main components of the employment relation as they exist in modernity. Through an analysis of the work of Locke and Hegel we will look at how the concept of labour is constitutively linked to that of property in the first instance, and in the second instance how it is mediated by the concept of the contract of employment. As we are going to see this schema creates the groundwork for the institutional development of modern societies.

The structure of this first chapter reflects the logic of these various conceptual linkages. We begin by asking 'what is labour' with the aim of attempting to elucidate its meaning as a human predicate and as a form of action that mediates the relation of humanity to nature. Throughout this analysis we will be contrasting Locke with Hegel but taking the latter as our main guiding point.

¹ Marx p. (1977) p.85. The excerpt as all references to this particular work is from the 1844 economic and political manuscripts. All references to this particular work are taken from Karl Marx Selected Writings (ed.) D. McLellan (1977).

After addressing the question of ‘what is labour’ we will return to Locke and see how one of the most influential forefathers of the modern liberal understanding of labour perceives its relation to property. Our main point will be that despite the fact that it justifies property through labour, property eventually acquires moral primacy over labour. The main consequence of this view is that labour becomes assimilated to an object of the external world that exists in the service of property that from then on has the right to command it. As a result of this we have the legitimacy of the subjugation of labour to property. It should be stressed that we are not attempting to analyse the historical evolution of the relation of property and labour. The point is of interest to us only in what concerns the logical consequences of the early liberal understanding of labour, since on the one hand it has been ever so influential to the structure of the modern system of labour as it has provided the basis upon which the predominant contemporary neo-liberal views on labour have been developed. We will contrast this view of Locke’s with Hegel’s understanding of labour. And crucially we will look at how the idea of the contract (of employment) mediates the constitutive link between property and labour in both theories.

The reason for the analysis of the positions of these two great philosophers is that in a sense they represent the basis upon which two divergent paradigms of the modern understanding of labour and employment in modernity have developed. In a sense we can say that Locke represents a liberal understanding of labour that eventually gives primacy to its economic dimension, whereas Hegel represents an understanding of labour that focuses on its social dimension without however, denying its economic character.

It is only natural that our next step will be a brief detour through Marx to pick up a point of critique. Given the momentous transformation that the emergence of capitalism brought to the relation of humanity to its labour and the consequent transformation in the social perception of labour, Marx’s denunciation of the dehumanisation of labour through its subsumption to the technical economic logic and imperatives of capitalism remains hugely important.

In the last section of this chapter and building on the analysis of the above mentioned theorists we will challenge the predominant in modernity understanding of labour as an economic function and employment as an economic relation, susceptible only to the rules of economic exchange. In this respect we will examine whether the understanding of employment as a contractual exchange relation can capture the

complexity of the mutually defining yet ambivalent relation between property and labour. Our point against this particular approach will be that the economic perception of labour and employment is one-dimensional and silences significant aspects of the human and social dimension of labour.

What we are going to argue is that the relation of humanity to its labour is an ontological condition that cannot be altered in its essence through the structure of the capitalist system of labour. This is so since capitalism cannot circumvent labour's essential human character. Capitalism may abstract labour in the form of raw undifferentiated labour power that becomes an object external to the labourer but it cannot eliminate the person of the labourer as the subject of labour from the economic system. The ontological relation as it exists between man and labour may be muted in capitalism but it cannot be abolished. The ambivalence remains alive and the subsumption can never be complete. As we are going to see this dual character of labour as an economic action and as a human and social creating force makes the relation of employment a relation that is characterised by the constant conflict of two interdependent parties. It is this ambivalent character as a relation of conflict and interdependence that defines the character of employment in modernity. As we are going to see we have a conflict that is conducted according to the diverging rationalities that guide the parties in their respective strategies in reference to the balance of power between them within the relation. The factor of interdependence between the parties stems from the fact of the indispensability of each for the successful pursuit of the interests of the other, a condition that cannot be transcended within the horizon of capitalist property relations. Underlying this argument is the urgent need to demonstrate that the employment relation is not an economic relation of exchange but rather a political relation that is constantly negotiated between a dominant and a dominated part.

1. Locke and the Early Liberal Approach on Labour and Property

Our analysis will start by addressing the intellectual origins of the liberal understanding of labour that became predominant in modernity. The purpose will be to describe the basic concepts that underpin our modern understanding of labour under the liberal paradigm. These concepts are those

of property and labour and what is of great significance under the liberal model is their mutually constitutive relationship.

The seminal work of liberal thought on the issue of the relation between property and labour is the *Second Treatise of Government* by John Locke², a book that was written when liberalism had the impetus of a radical and revolutionary movement that was in intense conflict with the antiquated political and economic institutions of the 17th and 18th century.

Locke in this book developed the basic premises upon which a liberal society based on the protection of private property should be structured. Of course the whole range of the issues that are dealt with in Locke's project far exceeds the narrow confines of this thesis. For this reason our analysis will focus on Locke's work only in what concerns the relation between the concepts that concern us here, namely property and labour, as it is developed in the text of the *Second Treatise*³.

For Locke the right of property upon things starts from the right of property to one's own person. '*Though the earth, and all inferior creatures be common to all men, yet every man has a property in his own person*'⁴. The excerpt introduces the principle of self-ownership that to a wide extent has provided the fundamental axiom upon which the liberal theory of property and labour, both in its classic and modern versions⁵ has been built. The content of the principle seems to be quite simple and straightforward: The person has an inalienable right of property to itself. This is a principle whose implications regarding its political and normative applications have been proved extremely controversial and complicated⁶. It should however be stressed that the principle of self-ownership is in a sense the founding concept of liberalism. For our purposes it is important to stress that through it Locke states the position that the integrity and inviolability of each one's person should be respected as of a matter of natural law. On another level this principle expresses the right of the individual to its self-determination. It is exactly this principle of self-ownership that leads Locke to the second stage of his argument. '*The labour of his body and the work of his hands,*

² Locke (1980)

³ In other words we will not deal with Locke's theory of property per se but only in what it concerns the justification of property through labour.

⁴ Locke (1980) p. 10

⁵ For the influence of Locke's theory of property on modern neo-liberalism, see particularly Nozick (1974).

⁶ Amongst others see particularly G. A. Cohen (1995), M. J. Sandel (1980) etc.

*we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left in it, he hath mixed his labour with, and joined it to something that is his own, and thereby makes it his property*⁷. If we accept the validity of the principle of self-ownership, then the logical content of the proposition seems to transpire quite logically. I own myself, I own my body and therefore I own whatever belongs to it, including its labour and its work. We will not linger here on the distinction between labour and work, as it has been put forward by Hegel himself⁸ and brilliantly analysed by H. Arendt⁹. For the purpose of this thesis the terms work and labour will be used as more or less interchangeable since our topic is not the various forms of labouring activity in modernity and their nuances, but the legal understanding of the employment relation. To return to Locke, what should be mentioned at this point is that the notion that labour is an inseparable part of the self is projected here in an unqualified manner. Locke here does not deploy an argument, he states a fact. *'The labour of his body and the work of his hands are his'*. For Locke this assertion does not seem to be in need of further justification. The absoluteness of the assertion and its strong connection to the principle of self-ownership makes one say that for Locke my labour is not just mine, but as it is an inseparable annexation of myself, it is me. The fundamental properties of the self are present in its labour. The second proposition of the excerpt raises the issue of the acquisition of property by the individual. How does the individual achieve this? Through the mixture of his labour with external nature. Since in the action of labour the self is inseparably present then the action of labour is the action of the self. In other words the individual through the action of labour appropriates the thing from the state of nature where it originally belongs, thus negating its alien and external character and makes it its own. In other words through labour nature as externality loses its character as alien and becomes domesticated. The thing through the action of labour upon it exists for the self. We will return to this a bit later, but for the moment we will leave the famous text continue exactly from where we left it *'...It being by him removed from the common state nature hath placed in it, it hath by its labour something annexed to it, that excludes the common right of other men: for his labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined*

⁷ Locke (1980) p.19.

⁸ Hegel (1971) pp. 419- 438.

⁹ Arendt (1958) pp. 79-174.

*to, at least where there is enough and as good, left in common for others*¹⁰. The assertions of this most famous passage that are of interest in our inquiry could be summarised as follows:

We have already said that through labour the thing loses its character as alien externality and becomes man's own. But my view is that in this sentence Locke makes an even stronger suggestion. The annexation of labour to the thing not only changes its character as external but additionally transposes it to another sphere, namely the sphere of human power and control. It does not belong to nature anymore, or to put it more strongly it is not just a thing of nature anymore, it is a thing that has been transformed through human praxis. It is under this perspective that the tremendous transformative power of labour can be perceived. It is the power that through the domestication of nature annuls its externality and annexes it to the human world and makes it an object of value. In Locke's words: *'for it is labour indeed that that puts the difference of value on everything'*¹¹. And he went on to say that of the products of the earth that are useful to man the nine tenths were the effects of labour immediately increasing the percentage to ninety-nine hundredths¹².

However as labour belongs to the self, the individual does not only extract the thing from the state of nature, from the common right of all, it also excludes it from the individual sphere of power of other men. In this instance we have the true justification of property as private property. This extraction, this transformation does not happen in the name of humanity in *abstracto* but for each human qua distinct person. Property as a right belongs exclusively to the certain, distinguishable individual that performs the act of labour upon the thing. Through the act of labour the labourer introduces it to a sphere that is exclusively determined by him.

Here we can see the results of the subsumption of labour under the notion of self-ownership. Labour is always individual labour. As a part of the self it belongs only to the self. It is a consequence of this understanding that we have the position that everyone can exclude everyone else from the products of his labour, since labour belongs only to the self.

'... though the things of the nature are given in common, yet man, by being master of himself and proprietor of his own person, and the actions of labour of it,

¹⁰ Locke (1980) p. 19

¹¹ Locke (1980) p. 25.

¹² Ibid.

*had still in himself the great foundation of property; and that which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniences of life, was perfectly his own, and did not belong in common to others*¹³ .’

In what concerns the ‘exclusionary’ dimension of the self, labour is the force that externalises it and makes it visible and palpable for the other through the acquisition and possession of property. In other words property provides the exclusionary sphere of the self with a concrete character, since it is now delimited as an externally visible area that covers the totality of the possessions of the self. Labour thus creates the third dimension that completes the concept of Lockean property by conferring to it a social meaning. This third dimension is what Locke describes as estate. The self may hold a right to life and liberty but these rights exist in themselves. For Locke they are considered as natural properties of the self as stemming from natural right. They are negative determinations that delimit the sphere of the inviolability of the person as an individual. Through the acquisition of estate the concept of property acquires a positive determination that exists alongside the negative one. Acquisition demands an action that comes from the individual actor; an action that as we have seen comes in the form of labour. It is the way that property can be legitimately acquired that delimits the legitimate sphere of action of the individual. This is so since property as possession upon external things now also defines the limits of the sphere of legitimate social interaction. The other cannot interfere with the sphere of power of the individual that is externalised by his/her property rights upon objects and moreover s/he cannot violate it. And this is not an abstract duty anymore that is oriented towards the other as an abstract individual, but rather an imperative rule of social symbiosis. In this sense property becomes a major normative concept, since it provides the rules that guide interaction between individuals.

This approach has as a consequence a deep change in the understanding of the relation between man and nature. Nature after labour is not undifferentiated; it does not exist for the common use of everyone and becomes privatised. As a result the relation between man and nature loses its immediacy and it is mediated by the existence of property rights. The objects of nature have names of owners attached to them and no longer exist as undifferentiated externality. The other cannot till a field

¹³ Locke (1980) p. 27

that I have tilled, since through my labour it does not 'belong' to nature anymore. On the contrary it belongs to my sphere of power and control and according to the logic of ownership¹⁴. I have every right to exclude anybody from it. In other words the field is not just a field anymore; it is somebody's field that is in the exclusive service of his/her purposes. On another level we can see that labour has become the medium through which the dividing line between the exclusionary sphere of power of the self as this is expressed as power upon nature and the sphere of power of other individuals is drawn. The importance and the original character of this sphere is emphasised by the fact that the validity of property rights over external things does not depend upon the recognition of others¹⁵. However, Locke did set some significant restrictions and qualifications to property, restrictions and qualifications that stem from natural right and relativise the absoluteness of the concept of property.

These limitations provide a very essential part of Locke's theory of property, as they set its limits. However, as the point that is relevant to this thesis is the justification of property through labour and not so much the extent of property in Locke's theory we will very briefly address the most important of them.

The most important qualification for the acquisition of property is the condition of improvement and the prohibition of spoilage. In my view it was the biblical notion of man as caretaker of the earth combined with the Protestant ethic of frugality that provides the background for the justification of this rule¹⁶. In Locke's own words: *As much as anyone can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for man to spoil or to destroy*¹⁷. At first, the individual is only restrained by the limit that his/her consumption sets. S/he can acquire as much as s/he can consume because otherwise the goods of the earth that God has given to man in order to enjoy would be wasted. It should be noted that as the prohibition is more theological and is not inspired by an equalitarian notion of justice is that spoilage is completely disconnected with the size of property¹⁸. Nonetheless, this assertion has as a very serious consequence. The other has a right to the land that I have left unused. He can occupy it and make use of it.

¹⁴ On the connection between being and having see Simmel (1978) pp. 306-307. Also 'Possession forms an extension of ego from which impulses extend to things'. Ibid p. 322.

¹⁵ Locke (1980) p. 21

¹⁶ See Tully, (1980) p.129.

¹⁷ Locke (1980) pp.20-21.

¹⁸ See Waldron (1988) p. 209.

The property right in this case is lost. However, Locke attenuated the significance of this proviso with the introduction of the money economy. According to Locke the introduction of money removes the probability of spoilage thus allowing the creation of large landed properties by disconnecting it from the ability of one person to cultivate the earth¹⁹. Money as a means of objectification of things as values totally changes the meaning of property. Property becomes something measurable and objectified through the use of money. It loses its character as a unique object and becomes a thing that has is measured by its value in money. What money economies have radically altered of the structure of property of the relation since money safeguards and makes far more easily exchangeable the value of property²⁰; property can be converted to money, an objective measure of value and a flexible medium of exchange that is not amenable to spoilage. When money occurs and the value of property is safeguarded, then its economic use no longer depends directly on the labour of the person using it, as it can keep its value without it, the prohibition of spoilage loses its field of application. It is not the not only the deprivation of the other from the means of subsistence that underlies the rule but the religious duty as derived by the protestant ethic of frugality to avoid spoilage and waste.

Relative to the prohibition of spoilage and perhaps the cornerstone in Locke's justification of property through the theological argument on the improvement of the earth: For Locke the right of property not only transpires from self-ownership; it is a divine duty that commands man to exploit and dominate the Earth²¹. '*God, when he gave the world common to mankind, commanded man also to labour*'²². As we are going to see self-ownership, appropriation and labour, in their mutual linkages, are commanded as a duty by God.

Therefore, the notion of property is mediated by the existence of a divine duty. God may have given the earth in common to all mankind but this only according to certain qualifications. Humans may appropriate nature when by acting in accordance to the divine command to '*subdue the earth, i.e. improve it for the benefit of life and*

¹⁹ Locke (1980) P. 23, 27-28. See also Macpherson (1980) On the Introduction of the Second Treatise of Government p.17, Locke (1980) pp. 29-30.

²⁰ For the transformation of property through the use of money see the classical analysis of Simmel in Simmel (1978) especially pp 307-312.

²¹ On the influence of Protestantism on capitalist economy and politics among his other works see Weber (1979).

²² Locke (1980) p. 21

*therein lay out something upon it that was his own, his labour*²³. The common hold of humanity upon nature is conditioned by the divine command to 'improve' the earth. When someone through labour acquires property he does so in accordance with the divine command, which of course can neither be tested by human reason nor be defied by the human will. In Locke's words 'He that in obedience to this command of God, subdued, tilled and sowed any part of it, thereby annexed it to something that was his property, which another had no title to, nor could without any injury take from him'²⁴. The other cannot question the validity of the divine command. The right of property eventually rests on theological justification. Hence we can understand the absolute character that Locke attributed to the concept. In this extract we can see the connection of the divine command to the principle of self-ownership. The other is excluded from what I have improved through work because the divine command for the improvement of the earth although addressed to the collectivity of men, can only be obeyed only by each individual separately. In other words the earth was not given in common to humans as collective humanity. It was rather given to those individuals of the collective humanity who in obedience to the divine command accepted to improve the earth through their labour. The act of labour in obedience to the divine command results to the acquisition of property. In other words, the person who obeys the divine command for the improvement of the earth acquires property. For Locke property is always individual property. His/her responsibility is directly towards God; the relation is directly between the person and God. The limits of responsibility are drawn by the principle of self-ownership. As the other owns him/herself as a free individual and therefore has autonomy of action according to his/her free will no one else can be held responsible for his actions. Consequently we can see that in the excerpt the labour that annexes the land can be only individual labour, because the self can have control only over its own labour²⁵. In Locke's own

²³ Ibid.

²⁴ Ibid.

²⁵ In this respect we see another dimension in the relation between property and labour, which however seems to me to be a somehow unclear. The human duty is to enjoy and improve the earth. How do humans achieve this? Through their labour. What is the outcome of labour? The answer is property. However, the duty of labour is not unqualified. Man does not have to labour for labour's sake, even if as a duty it stems from a direct divine command. It has an aim to which labour is instrumental. Labour has to result to the acquisition of property, which as a principle we may say it expresses the fulfilment of the duty of the improvement and the enjoyment of the earth. Labour becomes the mere instrument for the fulfilment of this duty. Its outcome and condition is property. From what we have discovered so far we can say that for Locke labour is a part of the self through which it exerts its power upon external nature thus delimiting its individual sphere of power and control.

words: *'So that God by commanding to subdue, gave authority so far to appropriate: and the condition of human life, which requires labour and materials to work on, necessarily introduces private possessions'*²⁶.

Relative to this are the provisions of sufficiency and the right to subsistence²⁷. The right of sufficiency is based in the Lockean expression *'...where there is as much and as good left in common for others'* and is based on natural law. These two rights are far more highly contested as some interpreters of Locke do not accept their validity and claim that the right of property when we come to the stage of civil society is virtually absolute²⁸, whereas others insist upon them and claim that not only they exist but that they also create a series of rights such as the right to the surplus of the other²⁹, or the tolerance of the hungry who steal in order to subsist themselves as long as there is as much and as good left for others.

However, as the debate on these issues far exceeds the limits of this thesis we will avoid discussing it. What we can say here is that according to our opinion Locke was a visionary of liberalism rather than a theoretician of capitalism. What is for sure is that Locke's idea of property is one that is conditioned by the satisfaction of the needs of others. Locke's vision was rather a form of agrarian, religious capitalism with strong communitarian elements based on the small landed property rather than the large scale, factory capitalism that emerged in the 19th century. It was no accident that when he spoke about property he spoke about landed property. However, his importance for the intellectual development of liberal capitalism lies in the fact that through the notion of self-ownership and the justification of property through labour he paved the way for the development of two of its main ideological foundations.

Having justified the category of property through the action of labour Locke goes on to justify the liberal theory of civil society and the state based on the principle of self-ownership and of the consequent ideal of the autonomous individual free will. The society and the state according to Locke come to existence through a free compact of individuals in order to protect their property³⁰ that as we have seen

²⁶ Locke (1980) P. 22.

²⁷ *'...men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things that nature affords for their subsistence.'* Locke (1980) p.18.

²⁸ For example Macpherson holds the position that Locke's limitations on the acquisition of property are eventually refuted by Locke himself (1962) pp. 203-221. For a similar but more moderate approach see Waldron (1988) p. 209-218.

²⁹ See Ascraft (1987) p. 127.

³⁰ Locke (1980) p. 111.

comprises life, liberty and estate. The state is a protective mechanism for civil society, a construction with a specific role to play. As derivative, the state cannot expand its jurisdiction beyond the limits that natural law through the founding act of the social contract has established for it³¹. While not going into all the detail here, it must be stressed is that they find their justificatory principle in the concept of property. For Locke the state is created for the protection of property. Property (in the enlarged perception of Locke which also includes the notions of what we would in modern legal terminology describe as individual freedom and autonomy) is the ultimate moral value that has to be protected by social institutions. An important point to be raised here is the relation of the right of property to the institutions of civil society. Since property is in the last instance derived through self-ownership via the medium of labour it owes nothing to the state. It is a natural right that is not susceptible to institutional determination and control³². What is interesting to be mentioned here, is that this limitation of the power of the government and the attribution to the state with the role of the protection of the well being of its citizens has as a consequence the their right to rebel against a government that exceeds the limits of its power, becomes arbitrary and tyrannical and proceeds to actions that gravely deteriorate the well being of the people³³.

It is now time to address the issue whether the Lockean view provides us with a plausible ground for the understanding of labour and its connection to the self. My view is that Locke has left a series of aspects of the relation underdetermined and vague. Some of the questions that emerge in this respect are: Where does this concept of self-ownership derive from? As far as we can tell self-ownership is not a condition that existed throughout human history. It may seem to us as self-evident but actually it was one of the most radical innovations of liberalism, a position that had a tremendous influence on the modern political and legal culture³⁴. And additionally: On the basis of which arguments can I justify the claim that I own myself? Does not the understanding of the self in terms of ownership reduce it to a mere object of possession, namely to externality³⁵? And further: Why are my labour and my work mine? And why should my labour without any further qualification justify my

³¹ Locke (1980) pp. 70-75.

³² See Macpherson (1962) p. 221.

³³ Locke (1980) pp. 110-116.

³⁴ See next chapter.

³⁵ See Cohen (1995) pp. 211-213.

property right? The answers to these questions were not developed by Locke but rather they were implied as logical facts stemming from the principle of self-ownership as not in need of further clarification and justification. The indeterminacy lies in the fact that although Locke justifies this schema in the last instance through labour he leaves unanswered the most essential question, namely the question of what labour is. Our point of view is that without valid answer to this question the relation between property and labour will remain undetermined. Hence it is the issues that this question poses that we are going to investigate next.

2. Hegel on Labour

For Hegel, writing the major part up of his work in the aftermath of the French Revolution, in Germany that was in the centre of the Europe of the Napoleonic wars the stake in analysing labour was altogether different from that of the puritan Locke who wrote in a an altogether different era. However, although Locke preceded Hegel for more than a hundred years he was describing a vision of a society that was about to become industrialised, whereas Hegel although living in a society with strong feudal elements that again was in the verge of industrialisation had an indirect knowledge -albeit at a very early stage- of the effects of industrialisation at another country. In this sense Hegel and Locke experienced very similar in some respects, yet very different in some others, social, economical and political environments. However and based on completely different traditions they arrived to very different conclusions on the issue of the relation between property and labour.

For Hegel labour first and foremost is an inherent characteristic of man and this is why he first and foremost deals with the question '*what is labour?*' in the ontological sense of the term. For Hegel it is this ontological character of labour that determines it as a social, political and legal category. According to Hegel labour provides the justification of the reality of the self in relation to itself, and on this basis he examines its relation to the institutions of civil society. We will trace Hegel's contribution to the modern understanding of labour mainly through his classical work '*The Phenomenology of Spirit*' (1807)³⁶. What we will try to do next is to give at this point

³⁶ Of course has dealt with labour in many more of his texts. We choose here limitation the *Phenomenology* as it is generally considered as the most authoritative work of Hegel in what concerns labour.

a brief account of Hegel's position on the issue of labour as it was expressed in his development of the dialectic of self-consciousness, since it is from there that Hegel's dialectic development of the concept of labour starts³⁷.

2.1 Labour and the dialectic of self-consciousness

Let us cut in at the point where Hegel deals with the problem of the realisation of the truth of the self namely, with the first form of self-consciousness and its relation to the external world. Hegel terms this form of consciousness, desiring consciousness. This is so because its relation to the objects of the external world is mediated through the drive of desire.

Desiring consciousness views the world as something external, self-existent, independent of it and moreover as opposed to it. For desiring consciousness, nature as externality is pure negativity in the sense that it has to be annihilated upon its encounter with the self in order for desire to be fulfilled. Desiring consciousness is a consciousness of immediacy. It consumes the object towards which it is oriented in the instance of its encounter. In this sense its relation to the objects of the external world cannot be one of permanence, since for it the object is an object of immediate consumption. Although desiring consciousness through consumption annihilates the external object and does not thus allow self-consciousness to establish a permanent relation to the world, it provides it with the true certainty of the self³⁸. It provides it with the feeling of being alive, with what Hegel described as the '*unadulterated feeling of the self*'. In other words, for Hegel the negation of externality through the satisfaction of desire provides the sentiment of the self³⁹. Through the satisfaction of desire the self acquires a feeling of certainty and consciousness a feeling of permanence but not through its relation to the world but rather through its relation to itself. As Kojève has put it, desire creates a subjective reality⁴⁰. In Hegelian

³⁷ Hegel (1971) pp. 228-240. All references to the Phenomenology are taken from the eight impression of J. B. Baillie's translation of the Phenomenology pp. 228-270.

³⁸ For a similar account, which however tries to establish the beginning of economic exchange on the immediate satisfaction of desire, see Simmel (1978) pp. 59-78.

³⁹ Kojève (1969) p. 4.

terminology, desiring consciousness is a consciousness that is in-itself. In simple terms this means that it derives its identity from its relation to itself and not yet from its relation to the other, to the beyond of it. In other words desiring consciousness is an unrelated consciousness. Desire, although it provides the condition for the creation of self-consciousness it cannot become self-consciousness without a relation of permanence to the world. The desiring self derives its determination from itself as desire and not from its permanent relation to externality. This is so since desire has as its end its own fulfilment that as we have seen is instantaneous and negative. According to Hegel this mode of being goes on in a generative repetitive cycle. By this he meant that the relation of consciousness to nature is not differentiated through the identity of the parties. This is so since the identity of self-consciousness is still incomplete. The reason for this is that desiring self-consciousness is still in itself and not for itself, it is not yet related to another self-consciousness, in other words it has not yet been recognised as such by another self-consciousness. It exists as incomplete in its dialectical unfolding. The term consciousness for-itself here means the identity of the self through the realisation of its difference to the other. This means that it has to attain an identity that it derives from its relation to the other. In other words it has to stop being monological and unrelated and attain recognition of its identity. As a result the self-consciousness that exists as generative and abstract consuming consciousness has to be established in the sphere of permanence in its relation to the world. It has to become permanently recognised by another identity. As H. G. Gadamer has succinctly put it: *'But the experience which the self-consciousness of desire inevitably has is, after all, that that alone which by self-negation can give it self-consciousness, has to be self-consciousness itself. That means, however, that the second self-consciousness is not only free to voluntarily confirm the self-consciousness of the first, but also to deny recognition of it.'*⁴¹ This need of self-consciousness for recognition introduces us to the famous passage on the dialectic of recognition better known as the dialectic of the master and the slave. The stake in this dialectical stage of recognition is the passage from the simple certainty of the self to the truth and freedom of the self. In other words truth and freedom can only come through the relation to the other. According to Hegel, self-consciousness can be attained and be for itself only by the recognition of desiring consciousness by another

⁴⁰ Ibid.

⁴¹ Gadamer (1976) p. 62.

desiring consciousness, only through a process of negation and domination that was understood by him as the original ontological condition of recognition. In other words, the quest for the achievement of true self-consciousness that is in-itself as well as for-itself is a passage into a state of war where one consciousness subjugates the other into its will and forces it to serve it. In this respect we have a dominating consciousness, the one that belongs to the one that has prevailed in the struggle for recognition, namely to the master, and a dominated consciousness that belongs to the subjugated part of the struggle, namely the consciousness of the slave. From thereon the consciousness of the slave does exist in itself as a servile consciousness. The servile consciousness suffers from the peculiarity that although it is for itself it does not exist for itself but only through the mediation of another, namely the master⁴². It exists to provide for the needs of the master and in this respect it has total disregard for its own self. But is the self-consciousness of the master a true and free self-consciousness? According to Hegel it is not since it is not an independent self-consciousness. First of all the recognition of the slave is not rewarding for the master since it is the recognition of an inferior consciousness. But moreover, it cannot be for itself since it has the need of the slave in order to relate to the world. The master cannot establish an unmediated relation of permanence to the world by himself since the slave provides for his needs that can only be satisfied through the mediation of the external world. The slave mediates even the fulfilment of his desires. The master still consumes what the slave produces for him. The master has no true and immediate relation to the world. In a sense he is still driven by desire although in a mediated form since desire is satisfied not through the negation of externality but rather through the consumption of the products of the slave's labour. The master produces nothing stable outside of himself. As Kojève has put it his enjoyment and his satisfaction are purely subjective. They are of interest only to him; they have no objective reality. His feeling of self-certainty, the feeling of the self that the satisfaction of desire confers⁴³ is provided through the relation of domination that he has with the slave. I would suggest that we should understand the master's consciousness as pure domination that exists in identity to itself. This means that the master cannot attain self-consciousness since he is not free as he has a dependent self-consciousness. The determination of the consciousness of the master is external since it is derived from the relation of

⁴² Kojève (1969) p. 16

⁴³ Ibid. p. 24.

domination with the servant. On the contrary, the consciousness of the slave according to Hegel is a superior self-consciousness for the following reasons: The first is that that servile consciousness even if it is not for itself has to face the contingencies that the powers of nature inflict upon it. Contrary to the master's the slave's relation to the external nature is one of immediacy. The slave has to work in order to provide for the needs of the master. This means that he has to battle with nature since he is directly exposed to its power and to the threat of annihilation that it imposes upon him. He is exposed to the experience of the fear of death as Hegel puts it. And in sharp contrast to the master the slave is directly exposed to it. He has no one to mediate between him and the experience of the external world as the master does. The fear of death, this most lonely of all human experiences forces the individual to retreat back to itself. In front of this most primordial of all sentiments the master and his needs have no relevance⁴⁴. The slave for the needs of this struggle against nature, against annihilation, has to develop his abilities in order to survive. How does servile consciousness achieve this? It is the answer to this question that now returns us to the issue of labour. Originally labour is the activity forced upon servile consciousness as the consequence of its defeat in the struggle for recognition. In simple words, the slave has to work for the master. However labour is also the practice through which servile consciousness experiences the world, the world that as we have seen is threatening its existence and inflicts the threat of annihilation upon it. It is exactly through work that the slave can negate the fear of death. Through work he subjugates external nature and this not anymore in the immediate form of desire. His struggle against nature has to endure in time because the threat of annihilation is permanent. He cannot annihilate it through a single act of consumption, not even through multiple acts of consumption. He has to establish a relation of permanence to the world in which the feeling of fear can be overcome. And he achieves this through work. It is exactly through this activity that the self can overcome the fear that nature imposes upon him. Work subjugates and domesticates the same nature that is the source of this fear. Through work consciousness learns to overcome this fear, since it learns how to put the source of this fear i.e. nature under its control. The other dimension of working consciousness is that it is a dialectically learning consciousness. It does not annihilate nature; on the contrary it forms nature. It does not annihilate externality

⁴⁴ Gadamer (1976) p.69.

through consumption but on the contrary it creates a permanent relation to it, since work does not destroy the thing in order to consume it immediately but on the contrary it shapes it, it forms it, it puts it in use for its own purposes. These purposes demand of it to endure in time. It is a lasting relation to the things of the world in the sphere of permanence. As Hegel has put it work is '*inhibited desire*'. It is not immediate and spontaneous as desiring consciousness was but on the contrary it is reflexive. It has to lean back on itself in order to plan its strategies in its battle against nature. Through the working process working consciousness develops its abilities that now as we have seen are not in use for the master but for itself. It is in this sense that through labour servile consciousness becomes a dialectically learning consciousness. Knowledge becomes the dialectical outcome of the cultivation of ability through labour. In other words working consciousness is a 'cunning' consciousness, the consciousness of skill, knowledge and ability through the use of reason.

Through the working process servile consciousness overcomes itself and becomes true self-consciousness that it is not only in itself but also for itself. It is freed both from the domination of the master and from the fear of annihilation that nature imposed upon it. As we have seen this emancipation is the outcome of the development of the learning and formative ability that consciousness acquires through labour. On another level the slave that has become a free man that can now relate to other free men on the basis of equality and mutuality. In other words through labour the social realm of freedom is opened up. We can understand now why Hegel understood labour as something much more than the justification of property. For him labour was the founding instance and the ontological groundwork of the self. We can understand now that labour is something more than just a predicate of the self. It rather inhabits the self as an inherent potentiality of it. Labour is expressed in the form of a specific action that has a mediating function in its relation both to nature and to other individuals.

The meaning of labour is now tied to the dialectic of recognition. Labour has been revealed to us in the following dimensions: We have labour as an emancipatory and constitutive force for the self, we have labour as an action through which the self acquires knowledge, skill and ability in its confrontation with the world and finally we have labour as the force through which the self establishes a permanent relation to the world and other selves. Under this perspective we can see labour as an inherent

characteristic of the self, as a constitutive element of universal individuality⁴⁵ that has a cognitive, a relational and moreover a formative dimension. It is this formative dimension that in a sense provides us with the essence of labour as action. This is so since labour does not only form nature through the consciousness of skill, ability and knowledge it also provides the decisive dialectical step for the formation of the self as a social being and from thereon the basis for the creation of social and political symbiosis. Labour in Hegel's sense can be seen as what creates the social world through the negation of the physical world, through the overcoming of the immediacy of nature. It is this dimension of labour that we are going to examine next.

2.2 The Dialectic of self-consciousness and the system of social labour

The self after its emancipation from its servitude can now (as a cunning consciousness of ability) relate to nature and to the other self-consciousness as a free person. The self after its emancipation from slavery is free to relate, to establish its contact with the other on the basis of mutuality and permanence. The first stage for the creation of the institutions of human symbiosis has been attained. This practical outcome is achieved due to the general character of labour as an ontological category (every consciousness can be a consciousness of ability) and through the permanence of the relation that it establishes to the world. In other words working consciousness is a universal consciousness. It is upon this level of universality it is that the potential for the social and political symbiosis is based. As Marx had commented in the Paris manuscripts on the Phenomenology: *'He (Hegel) conceives labour as the self-confirming essence of man... Labour is the means by which man becomes himself inside externalisation or as externalised man'*⁴⁶. It is exactly this externalisation that makes humans social beings. Humanity is not just interiorised substance that is in opposition to nature but rather consists in exactly this externality that as free externality is in coexistence with other externalities⁴⁷. Through labour the basis for the creation of political society has been established.

⁴⁵ Hegel pp.423-431.

⁴⁶ Marx (1977) p.101.

⁴⁷ On the concept of externality see infra.

We should make clear that in his analysis Hegel never had in mind the liberation of labour from capitalist domination. What Hegel had in mind was the pre-capitalist non-alienated labour of the small independent craftsman-producer. His is not a critique of capitalism; his schema, as it unfolds in the *Phenomenology*, is conceptual. On the other hand one could say that it was Hegel's embeddedness in his historical context that drove him into perceiving the historical struggle between feudal lords and vassals as the original human condition. '*In his dialectic, he does not describe the wage-worker, but principally the farmer and handworker in bondage*'⁴⁸.

Hegel's aim was totally different than that of Marx. Hegel never sought the social liberation of labour. In the *Phenomenology* his aim was the understanding of the system of human knowledge. Labour concerned him primarily as a cognitive category and only derivatively as a social and a political one. The main aim of Hegel in this part of the *Phenomenology* is to give an account of the construction of the self. The significance of labour for Hegel lies primarily in this. On the other hand the conceptual construction of the self is effected through a relational dialectical process. The self does not use labour monologically and *in abstracto* but in reference to its relation to the other. Or to be more precise, for Hegel labour is what creates this relation to otherness, which in the first instance takes the form of external nature and in the second the form of the other self. It is the universal character of labour as a category that provides the unity of the world through the development of the '*self-consciousness of reason*'⁴⁹. Here lies the major social significance of labour as both a creative and a cohesive factor of human society. This introduces us to the dimension of labour as a social force. After the process of recognition, it is through labour that the process of social exchange can be initiated. The self relates to the other self as one free labourer to another. However, the relation now is one of equality and mutuality⁵⁰. The notion of civil society as a society that is based on the interaction of free working persons finds its origin in the understanding of the human self as a free producer that is recognised as such by other producers. We can see in this notion the formation of one of the fundamental principles for the construction of the terms of the human symbiosis on the institutional level. Hegel had understood that the origins of the

⁴⁸ Gadamer (1976) p.73.

⁴⁹ Ibid. p.72.

⁵⁰ '*Thus the relation of reciprocal recognition, on which interaction is based, is brought under norms by way of the institutionalisation of the reciprocity established as such in the exchange of the products of labour*' Habermas (1973) p.160.

political institutions of bourgeois society could be found in the act of the free exchange of the individual products of their labour. Ego recognises alter as equal in the act of the exchange of products of labour and converge into the institutionalisation of the relation of reciprocity and thus create the first form of political symbiosis⁵¹. It is through labour that the ex-slave becomes the citizen. Moreover, labour is a collective practice at many levels. Not only as it is practiced collectively and requires the combination of effort, skills and knowledge of many individuals⁵² (work usually involves the cooperation of people) but moreover since as a practice it uses the collective knowledge, experience, tradition and memory of a working community^{53 54}. For example, a worker makes a chair through his labour. However, in order to make the chair he has to use the skills that s/he has learned from others and following a design that was given to him either as someone else's creation or as the result of a traditional pattern that has evolved by many creators through history.

Labour in this respect is not only one of the fundamental forces that create society but moreover a form through which the knowledge and experience of a society are reproduced as belonging not only to the individuals involved but to a society as a whole⁵⁵. Labour in this sense initiates and establishes history as the history of humans that evolve and progress exactly through their labour⁵⁶.

A short comment on the dialectic of the master and the slave is necessary at this point. It should be stressed that in what concerns the dialectical relation of the master and the slave the dimension of the social structure and of the social system of labour enter only as a distant implied background that does not belong to the essence of the relation between them. The stake of this relation is a cognitive one. It concerns the conceptual construction of the self. The fact that through the dialectic of recognition Hegel establishes the primary condition for the understanding of human relations, a

⁵¹ See *ibid.*

⁵² See section 5 of this chapter.

⁵³ Marx (1976) p. 1024

⁵⁴ We use the term working community here because this collective knowledge and experience does not necessarily belong to any particular society. Particularly in our days this knowledge and experience crosses national borders and is mostly reproduced through the actual development of a profession on a global scale. For example we can imagine the medical profession as an international working community where a doctor in the United Kingdom may benefit in his/her work from the experience and knowledge of colleagues from all over the world. This working community has to do with the actual practice of labour as it takes the universal form of a profession.

⁵⁵ For a similar view see Simmel (1978) pp.411-413.

⁵⁶ Kojève (1969) p.47.

primary condition that is based on power and domination in this respect should be seen as a derivative consequence of its main point.

I should also say that while I find more than insightful the dialectic of self-consciousness and to the role that Hegel attributed to labour as the crucial instance for the formation of the true self-consciousness, I am less comfortable with the presupposition of a relation of domination as the prerequisite as an a priori condition for the development of the dialectic of self-consciousness. Although some of Hegel's commentators consider the stage of domination as an imperative condition of human interaction⁵⁷, I nonetheless agree with Gadamer when he says that Alter may deny recognition to Ego, but it is not an imperative condition that it does. It can in fact be maintained that the process of recognition between Ego and Alter has to come through an a priori condition of domination. In the instance of recognition we do not have a real ground of conflict for it to be so. Conflict cannot pre-exist the moment of recognition. I agree with the interpretation of Hegel that asserts that work is the decisive instance on the formation of true self consciousness, or as Heidegger has said, of the objectification of the actual that gives rise to the experience of subjectivity⁵⁸, but I do not see why does this have to transpire through a dialectical process of conflict, domination and emancipation. This position has more to do with the dialectical understanding of the world by Hegel, his understanding of the historical experience of evolution of the western world, rather than anything else⁵⁹. It has to do with the unfolding of the dialectical thought where concepts exist only as stages that are to be 'sublated' into more developed conceptual stages. In this respect it is the dialectical schema that imposes the pre-existence of the stage of domination so that the latter through the mediation of labour can be dialectically sublated into the more developed stage of emancipation.

From another point of view we can say that the problematic instance in this dialectic schema is that the drive of negation as it exists between the desiring consciousness and the external world has to exist as an imperative in the instance of the meeting between ego and alter, between in other words two desiring consciousness. The stake in the two instances is totally different. In the first case I want through consumption to satisfy my desire. In the second case the stake is not the

⁵⁷ See for example Kojève (1969) pp. 10-16.

⁵⁸ Heidegger (1993a) p.243.

⁵⁹ For such an interpretation see Kojève (1969) pp. 62-74.

satisfaction of desire but the recognition of the self. It answers to the demand of the simple consciousness to be recognised as such in its truth by others. Hegel has said that simple consciousness is generative and perceives the existence of the objects of the external world in the same way, namely as generative and abstract. In this way consumption is annihilation of the undifferentiated other. However, the other self-consciousness cannot be reduced to this existence of genus, even if it is yet only in itself. The fact that it is in itself attributes it with the feeling of individuality, with '*the unadulterated feeling of the self*'. It is an individuality even if not as yet recognised as such. It is externality but not undifferentiated externality. As Habermas has correctly remarked the other in his/her negativity cannot be perceived as an object. His/her individuality as externality demands that s/he is perceived as an adversary rather than an object⁶⁰. In this respect what Hegel does is to transfer the stake of one relationship i.e. desiring consciousness-external world, to a distinctly different, i.e., simple consciousness-simple consciousness, in the instance of their encounter. Negativity and annihilation is transformed into adversity and domination. This is not to say that the relation of recognition between ego and alter cannot pass through the dialectical stage of domination. On the contrary, human history has taught us that it obviously can. But this is a practical possibility and not a logical imperative.

What then remains of the dialectic of the master and the slave? Can we still claim the fundamental link that it posits between labour and subjectivity? The answer to this question is emphatically yes. The decisive instance here is the dialectic relation between desiring consciousness and working consciousness, in its dimension as formative consciousness. Nonetheless, this does not negate the fact that within the relation of domination, the premises within which the dialectic of the master and the slave operates are valid. They certainly are. But they do not describe the system of social labour. As we have seen they have social and political implications but they are not social and political themselves. Within their field of operation they give us valuable insights into categories that are social and political and that in a conceptual and analytical form. For example, the relation of domination is a social and political relation but in Hegel is not given as such. It is rather given in its conceptual dialectic form.

⁶⁰ Habermas (1973) p. 163.

Moreover one could say that Hegel's description is valid as we have said above for agricultural or artisan work, but cannot apply to the modern division of labour where the greater portion of the population is employed in the sector of services where nature in Hegel's sense it is not present. However, it should not be forgotten that Hegel's theory was that labour was the mediating factor in the relation between man and externality and demonstrated the universal form of this relation. In this sense externality is physical nature. The creativity of labour may have changed its field of application but not its essence as a mediating action between humanity and its externality. As S. Moscovici has debated⁶¹ nature is a category that is formed in a dialectical relation with human action. Nature in this sense is a social category that is not static but rather evolves in its interaction with its relation to humanity. Under this understanding externality is both the social and the physical world with which humanity interacts through labour. In this broadened concept of nature, labour and technique play an even more important role, since through labour humanity interacts with and eventually creates the environment it lives in. Therefore, the modern division of labour and the fact that the majority of the workforce works in the services sector does not alter the character of labour as an action that is the medium of the relation between humanity and the formation of its externality. No one denies the importance of the professional life as a most important element of the formation of personality. In summarising and despite the major alterations that it has brought about, the character of labour as such, as action that mediates the relation between humanity and externality, as one of the '*essential traits of specifically human practice*'⁶² has not changed in modernity.

As we are going to see further on, Hegel's dialectic of the master and the slave paved the way for the development of Marx's theory of labour. However, something that both Hegel but more so Marx oversaw is while labour is a fundamental dimension of the human personality it is not the only one, nor is it the dominant one. We cannot attribute everything human to the labouring act. As J. Habermas, has shown, the equally fundamental dimension of human interaction through communication does not 'pass through' labour. It is an altogether different relation that does not have so much to do with the relation of humanity to nature but with the relation of man to man. In Habermas's words: '*Liberation from hunger and misery does not necessarily*

⁶¹ Moscovici (1998) chapters one and two.

⁶² Gadamer (1981) P.75.

converge with liberation from servitude and degradation, for there is no automatic developmental relation and interaction'⁶³. In other words labour is a fundamental constitutive feature of the social self, but it is not the only one.

3. Locke and the Employment of Labour

In the previous section we attempted an analysis of the phenomenon of labour and we established the complexity and the multiplicity of it as an ontological, cognitive, formative, practical and social category. We will now turn to the contract of employment as it mediates the connection between property and labour; and with this we shall return again to Locke⁶⁴. We have said in section one that Locke was not interested in an analytic of labour but rather approached it as an instrument for the acquisition of property and thereupon as the basic legitimating principle for the creation of the institutions of civil society. What we will see next is whether the Lockean understanding of labour can grasp its multiplicity as a phenomenon.

We have said that in the *Second Treatise of Government* labour is given as a datum. Unlike Hegel for Locke labour is not analysed as a fundamental predicate of the self but rather it is given as its undifferentiated extension that mediates its practical relation to the external world. When Locke says '*...for his labour being the unquestionable property of the labourer*'⁶⁵, is it because Locke understood the inherent relation of labour to the self and considered it as an essential inseparable characteristic of it? Or is this relation contingent and instrumental and has as its only end the legitimate acquisition of property? In other words in the Lockean doctrine does labour have any meaning outside property?

Let us pick up the thread again from Locke here. He says: '*...Thus the grass my horse has bit; the turfs my servant has cut and the ore that I have digged in any place, where I have the right to them in common with others, become my property... the labour that was mine, removing them out of that common state they were in, hath*

⁶³ Habermas (1973) p. 169. On the relation between labour and language see also Gadamer (1981) pp. 75-76.

⁶⁴ Generally for the discussion of Locke on property see Waldron (1988) pp.137-252. For a critique see Macpherson (1978) pp.199-207 and Macpherson (1985) 21-34 and 86-91.

⁶⁵ Locke (1980) p. 19.

fixed my property in them.'⁶⁶ What is of interest from this excerpt in respect to our analysis is the action of the servant. The turfs that the servant cuts are not his property, which he later exchanges with the master on the basis of free exchange, i.e. in market terms, but they belong directly to the master. Any notion of a relation of slavery by virtue of which the servant and therefore his labour belong to the master is totally out of the question. Locke's expressed views on slavery totally rule this out⁶⁷. Moreover, the axiom of self-ownership that provides the basis of the whole construction of Locke's theory is totally incompatible with any notion of slavery. For Locke the principle of self-ownership is absolute and cannot be negated by anything. The servant is a free labourer. However, here we have an insoluble problem. In Locke's theory the person owns itself and consequently s/he owns whatever it mixes its labour with. But here the servant's labour is mixed with something that comes to be owned by the master. The servant owns himself but he does not seem to own his labour since he cannot claim property on the things that he has extracted from the state of nature. They belong to the master. Are not the principle of self-ownership and the justification of property negated here? Why does not the servant's labour grant him the right of property to the turfs that he has cut? The principle of self-ownership and the notion that the labour is the unquestionable property of the labourer should immediately grant him the right of property over them. How do we solve this contradiction? The solution comes through the legal device of *contract*. In this schema there exists a tacit assumption that the servant has freely agreed to provide his services to the master, where the latter extracts the products of the labour of the former in exchange for wages. Through contract the servant sells his services to the master in exchange for wages, thus conferring him with a temporary power over him/her that extends as far as the contract between them stipulates⁶⁸. The schema should now read as follows: The servant as a free person owns his services since he owns his labour and therefore he is free to dispose it in the best possible manner he sees fit. There is no sign of coercion in the schema since the principle of self-ownership in appearance at least is not violated. The servant as owner of himself decides to expropriate his labour. Since it is his he can dispose of it in the best way he considers appropriate for his self-interest. Neither his freedom nor his right of self-

⁶⁶ Ibid p.20.

⁶⁷ Ibid pp. 17-18.

⁶⁸ Ibid. p. 45.

ownership are negated. This at least stands before the conclusion of the contract. Contract in this case must be seen as the legal device that has as its function the regulation of the expropriation of labour. The question that emerges next is which is the servant's relation to his labour after the conclusion of the contract? Does it still belong to him? The answer that comes directly from the text is that it does not. He has assigned it in the form not only of present but also of future action directly to the master. And if the action through contract 'belongs' to the master so do the products. Through this realisation we can perceive another dimension of the Lockean perception of labour. In contrast to what Hegel maintained, for Locke labour has an indeterminate character. It is not as the case was for Hegel a force through the use of which humanity forms external reality according to its will and through this, forms the social self, but on the contrary it becomes an alienable feature no longer inseparable from the self. In other words the ontological link between labour and personality is lost. As a result the justification of property through labour loses its coherence. If I can expropriate my labour, if labour is not an inextricable part of myself that makes whatever it mixes itself with mine, then the justification of property through self-ownership no longer stands. It is no longer inherent to and inseparable from me, since it can be alienated from me. The relation of the self to its labour loses its absolute character. It can exist as distinct from the person. The assertion that labour is the unquestionable property of the labourer loses not only its force as the justificatory notion of property but also its inextricable connection to the self. The justification of property is thus severed off from labour. Labour from there on loses its connection to the principle of self-ownership and can be externalised and alienated from the self. In this respect labour becomes a thing external to the self, a thing that can be appropriated, manipulated and disposed of as every other thing of the external world. As a result, it becomes groundless, contingent and hetero-determined by property.

It is in this respect that we can say that we have the emergence of the contract of employment as the predominant form for the use of labour. Through contract labour can be freely alienated from the labourer and be employed for someone else's purposes. We will see the full implications of this when we examine in detail the notion of the contract of employment but at this point the only comment that can be made is that this understanding of labour and its eventual disassociation from property underpins the development of the modern doctrine of labour as it is understood neo-liberalism and its market expression of the economy. As we are going to see in

chapter two this perception of labour provides the basis for the construction of the modern capitalist system of social labour.

But we are moving too fast. Let me summarise the schema so far: We have a problematic vacuum in regard to the justification of property. It is the passage by Locke that betrays how problematic the relation between labour, property, and contract is in modern societies. We can see both the justification of property through labour but also the negation of this justification as it occurs through contract. In this schema the temporal linearity that the modern liberal doctrine of property adheres to, is turned on its head. Contract in what appears to be a linear and straightforward relation between labour and property enters as an antecedent factor that radically changes its character. I say antecedent because in the schema that we analysed about the servant's labour, contract pre-exists the labouring action of the servant and becomes the only determining factor in the relation between his labour and the right of property that it creates. In this respect the relation between self-ownership, labour and property loses its primordial justificatory character. Property is no longer a logical outcome of labour that stems from the concept of self-ownership. It is rather the outcome of a prior agreement between a master and a servant, or in modern terms between an employer and an employee that on the basis of a contract decide the price for the assimilation of the servant's labour to the master's property. This is so since contract not only justifies the master's property right on the servant's work, it totally assimilates it to his own. The servant's and the master's labour are legally perceived as one and the same thing. In this respect the justification of property as it was originally expressed by Locke totally changes its meaning. The original maxim should now read: *The labour of his body the work of his hands and the labour power he has purchased through contract are properly his.* The notion of the contract of employment as the legal use of paid work for the purposes of its buyer in exchange for a wage comes about for the first time⁶⁹. At a second level and with a somewhat far-fetched metaphor we can say that we have through the assimilation of labour we have in a sense the assimilation of the self of the labourer to the person of the master. The labourer exists through his work for the purposes of another...

We can see now how, labour loses its significance as the sole and immediate justification of property. This does not mean that labour loses all of its importance in

⁶⁹ For the difference between contractual employment and traditional forms of employment see next chapter.

the liberal doctrine of labour. As the legitimating instance of bourgeois society it cannot. But labour now has become the distant legitimating factor of an abstract original acquisition. This is so since any property right should actually be traced all the way back to a first labouring act. The system of civil law regulates the legitimate transference of property rights mainly through inheritance and contract⁷⁰. For these rights to be transferred they must have been legitimately acquired. And the primary form of acquisition is labour. However, the original labouring act that creates the first property right is lost somewhere in time. From the point of view of the legal recognition of property rights the original act of possession through labour loses its significance. If the property right has been legally recognised as valid then its source, provided that it is a legitimate one, becomes legally irrelevant. In this sense labour has a function as a legitimating source of property until its official legal recognition. From that moment on property becomes independent of it. When in the sphere of contract property meets labour it confronts it as a legal category that is totally independent of it. From there on property becomes the dominant force in its legal relation to labour. Property rights from now on are not derived through the property-holders labour but on the contrary through the contract for the labour of their servants. The property right that is going to be created through the servant's labour has already been fashioned in advance by the contract between the master and the servant. Contract in this respect- conceptually at least- becomes prior to property rights and prior to the category of labour. In this respect we have the problematic feature in Locke's schema in the fact that the exchange of property takes precedence over its acquisition. Whereas originally at least, in the liberal doctrine labour is an extension of the self and prior to any form of exchange, here becomes contingent, dependent on property and determined by a prior act of exchange.

This position has as a result a moral hierarchisation in the relation between property and labour. Property becomes a higher order value that takes precedence over labour and retains the right to command it. As a result labour is not self-sufficient. If we follow the logic of Locke, if labour is to have any meaning it has to

⁷⁰ For example Nozick holds that distributive patterns are just if a holding is acquired according to principle of justice in acquisition. Any acquisition according to the principle of justice in transfer is also just Nozick (1974) p. 151. In this respect justice eventually in acquisition comes to the observance of a set of formal rules where the role of labour becomes attenuated just as a possible among others form of just holding. We should forget property for the created thing goes to the buyer of labour power and not to the labour him/herself.

be reflected in the legal recognition of property rights upon things. Property rights no longer need labour in order to achieve legal recognition.

In this respect, Locke inhabits a totally different world than the one of Hegel of the *Phenomenology*. We can see now that for Locke labour is but a logical (but as we have said not absolute) prerequisite for the intellectual and moral justification of property. After property has been justified in the institutions of civil society, then labour becomes redundant. As a result of this we have the political reversion of the original relation. Labour in this respect functions as a conceptual pretext for the justification of property. By the moment that property becomes conceptually justified, the category of labour becomes sidelined and the concept of property, as an established and moreover totally justified social ideal may unfold its full implications in the political and economic discourse of bourgeois society.

We can see now the Lockean relation of labour and property under a new light. We have seen that Locke starts from labour in order to justify the institutional arrangement of bourgeois society⁷¹. We can now see that in reality the justification follows the reverse path. It is not labour that determines what the institutional setting of bourgeois society should be but rather the institutions of bourgeois society that determine what labour is. The schema of the justification of property through the metaphor of the state of nature loses its validity and it is turned on its head. In bourgeois society labour is determined by contract and by the legal system of protection of property rights and not the other way round as the legitimating schema of property would have it. In other words the ideological sanctification of work ends up in its practical denial. Again what needs to be stressed is that Locke here did not have in mind the capitalist system of labour for the simple reason that it did not exist at the time he was writing. On the contrary it describes one basic precondition for its development, namely the subsumption of labour under the legal instrument of the contract of exchange.

To conclude: we have seen some fundamental consequences of the Lockean approach to the relation between property and labour. We could say that in Locke we have the justification of a relation when the one aspect, namely property is dominant and the other repressed. In the Lockean schema labour as a category exists for and through property. Property determines labour by setting it in action for its own

⁷¹ For the same view see Habermas (1971) p. 97.

purposes. The instrument for this determination as we have said is contract. Contract fundamentally transforms the relation by altering the terms of exchange. It is no longer the products of labour that are being exchanged, but rather labour itself. It is the principle of self-ownership, the assumption of the self in the logic of property that allows the labourer freely to dispose his labour in any way that s/he sees appropriate. However we have said that, as labour is the crucial element for the development the free self, the act of exchange submits the labourer to the determination of property. In other words, the result of the Lockean contract is firstly the domination of labour in the person of the labourer and secondly its determination and assimilation by property.

It is on these two issues that we are going to turn our attention next and we will attempt to seek an answer in the way Hegel treated the issue of the integrity of labour against the demands of property.

4. Hegel and Employment as Exchange

Capitalism, as we have seen, had to put labour in action according to its own perception of it and according to its own rationality: labour thus becomes a phenomenon that is primarily determined by its market function. Labour relations are from this point on market relations and are legally understood and regulated as relations of exchange. What we will do now, with the help of Hegel - no longer of the *Phenomenology*, but of the *Philosophy of Right* - is to query whether the legal understanding of the labour as it expresses itself in the relation of employment can preserve the integrity of labour in its dimension as a human creative force.

Labour, as we have argued with Hegel in the previous section, is not a thing. In the first instance it is a potentiality that inhabits the being of the person and is an essential constitutive factor in the construction of her/his personality. In the second instance it is a form of action that establishes a relation of permanence on a first level between man and nature and on a second level a relation between Ego and Alter as social beings. As we saw, labour in principle cannot be exchanged in itself but only the form of its product. If it is to be exchanged it is imperative that it acquires the objective form of the thing. What we are going to attempt next is to see how legal

philosophy tried to work its way around the problem by trying to balance between the perception of employment as exchange and the personal integrity of the labourer.

To make this more intelligible let us return to Hegel and to another classical text where he viewed the issue of labour from a quite different perspective than that of the *Phenomenology*. In the *Phenomenology of Mind* (1807) what Hegel tried to establish was the dialectical development of consciousness and its relation through knowledge to the world. On the contrary in the *Philosophy of Right* (1821)⁷² he tried to describe the ethical foundations of legal rights, civil society and the state. In both these efforts the idea of labour is of paramount importance albeit under a different perception and with a different role. As we have seen in the *Phenomenology* Hegel does not deal directly with the social system of labour but rather with the significance of the practice of labour for the ontological construction of the self. The *Phenomenology* does not operate within the sphere of the political even though as we have seen it establishes the groundwork for the development of the political. In the case of the analysis of labour in the *Philosophy of Right* we are within civil society. It provides us with an understanding of the system of social labour in its dialectically derived ethical terms.

Hegel of course was not Marx. He was not a revolutionary. Moreover, the authoritarian Prussia where he worked for most of his academic life although in the very early beginning of industrialisation was a totally different society from the liberal, industrialised Britain of the same period. This makes his understanding of social labour even the more interesting since in a sense he tried to derive it from a conceptual understanding of labour in its almost, but not-yet capitalist form. However, we have to acknowledge the fact that although Hegel did not live in a society of advanced industrialisation as Britain was at the time, he was not unaware of the concept of a market-based economy. He perfectly understood bourgeois society and its economic interrelation to private law⁷³. In other words he understood the orientation of the legal to the emergent capitalist market economy and the dependence of the latter on the institutional force of the legal. However, no one could possibly say

⁷² As the case was with the *Phenomenology* since the references to the text will be numerous and since we will refer to paragraphs rather than to pages we will only mention here the specific edition where they were taken from. The edition was the *Elements of the Philosophy of Right* (1991) by the Cambridge University Press.

⁷³ Habermas (1973) p.167.

that his thought was influenced by the concept of a market-based society as the case was for his contemporary British liberals⁷⁴.

Hegel's work is central for the modern understanding of labour because he has talked about labour *per se* both in its phenomenological-human and its social-political dimension. It is in a sense the Hegelian notion that man is the result of his labour that paved the way for the development of Marx's critique of capitalism. However, unlike Marx, Hegel perceived labour in its conceptual rather in its socially concrete form. For Hegel social relations have an overarching conceptual character that determines their actual, concrete form. It was always a case of conceptual essence that overdetermines the material form. Nonetheless, as a consequence of his conceptual approach Hegel provides us with an understanding of the social role of labour as influenced but not completely determined by capitalism.

Hegel's justification of property unlike Locke's did not come through labour. Following a totally different path he derived it according to the following schema: The first step for the legitimate acquisition of property is the taking of possession by the self of an object of the external world through an act of free will. This means that the act of possession is not enough by itself. It has to be accompanied by a certain disposition of the will. First of all the will has to be free, namely not hetero-determined in its volition towards the object and secondly it has to move towards the thing with an appropriative intent. It has to want to make the thing its own. The thing that before the act of its possession by the free will existed as a negative object in itself, after the act of possession is possessed by the free will. The consequence of possession is that the free will determines the external thing in its substance. This determination of the substance of the thing takes place through the use of the thing. Through use the will leaves its mark upon the thing that from this point on exists for and through the free will, in other words it is subsumed in its sphere of power. Use is an act that is externally expressed as the alteration, destruction or consumption of the thing. The selfless nature of the thing is thereby revealed as it now takes its meaning and substance from the individual will that possesses and uses it for its own purposes. This is so, since the thing is according to Hegel something unfree, impersonal, and

⁷⁴ For liberalism and the ideal of a market based society see next chapter.

without rights. The thing is not an end in itself and therefore has no subjectivity (§42 of the Philosophy of Right)⁷⁵.

After having clarified this we should return to the main line of our analysis. The conclusive justification of property for Hegel where the above-developed doctrine is summarised is found in § 61 of the Philosophy of Right:

Since the substance of the thing for itself, which is my property, is its externality, i.e. its non-substantiality - for in relation to me, is not an end in itself - and since this realised externality is the use or employment to which I subject it, it follows that the whole use of employment of it is the thing in its entirety. Thus if I have the whole use of the thing, I am its owner; and beyond the whole extend of its use, nothing remains of the thing which could be the property of someone else.

Further into the text Hegel makes a sharp contradistinction between property and the mere partial and temporary use of the thing, the latter defined as that which does not touch the substance of the thing (§ 61 & 62)⁷⁶. This distinction is of vital importance to us since as we are going to see further on, Hegel uses it in order to justify the contract of employment.

What is important for us to keep at this stage is that property is first and foremost determined by an act of the free will, which has the ability to determine through possession and use objects that originally are external and non-substantial in their essence. In a sense we could say that for Hegel the right of property is eventually the right of determination of externality by the self.

This determination takes place in two stages. In the first instance it takes place within the sphere of personality where the free will approaches the thing with an appropriative intent and in the second this intent acquires an externally visible form in the act of possession and use of the thing. Neither the free will nor possession are adequate by themselves to confer complete property upon the thing. They are

⁷⁵ A vital clarification should be made at this point to what it concerns the concept of externality. Externality can mean as we have seen both in the Phenomenology but also here the undifferentiated natural sphere that is opposed to man as something that exists on its own account. It is in this sense that externality is something that has no subjectivity at all. However, externality as we have seen at the end of section 2.2. can also mean the sphere of interaction of free individuals on the basis of their identity. In other words the interaction of individuals who are in themselves as well as for themselves. It means the sphere of social interaction and communication. In this respect we can see the two different meanings of externality as stages of the same dialectical process. Through labour externality is negated as the negative existing in itself otherness and becomes a space that derives its determination from human interaction. In this respect when we talk of property we will use externality in the first sense whereas when we speak of human interaction in the second.

⁷⁶ This distinction can also describe the distinction between freehold and leasehold property.

complementary stages of the same process. The one stage is internally oriented and expresses the volition of the will for the acquisition of property and the second brings the thing within the sphere of power of the self. In another sense the act of possession communicates the volition of the free will to the others as it removes the thing from their respective sphere of power⁷⁷. As Hegel himself has noted in the addition to §61: *A force exists only in so far as it manifests itself*.

However another qualification is introduced here in what concerns the acquisition of property. Hegel states that a person is the owner of the thing only if s/he has the whole use of it. What this means is that property means the full determination of the thing by the person. A person cannot be the owner of the thing if s/he partially determines it. In this case we can have use of the thing or even some other legal right upon it, but not the right of ownership. In view of this I do not believe that we should view the difference between ownership and use as a mere quantitative difference of degree but rather as one of substantial as opposed to partial determination. In other words, the difference between ownership and use should be seen as a difference of substance and not as difference of quantity. We will see the relevance of this when we deal with the contract of employment.

Under this perspective externality acquires a new meaning. It is not only the sphere of the external world as we have seen it in the *Phenomenology*. Here externality has lost the 'mystical' character that it had there. It is no longer the negative unknown that is the source of dangers and fears for the self. On the contrary nature here has been domesticated and externality now means the sphere of the world of objects, which is non-substantial in itself and most of all hetero-determined by humans. The thing now is not what it was before; the use of the thing now determines what the thing is. It does not have a substance of itself, but it derives it from the will through and for which it now exists. It is the purpose of the will towards the thing as it expressed through its use that determines the substance of the latter as a tool, instrument, object for consumption, object of artistic pleasure etc. As Hegel has said the '*whole use or employment of the thing is the thing in its entirety*'.

Therefore, we could say that for Hegel property can be understood as the right of the free will to determine the substance of things for itself. Determination in this

⁷⁷ We can see the complementary character of the free will and possession in the case of the mere use of the thing. Hegel in §62 he suggests that an interpretation like ours can be valid. This is so since he states that use without being complemented by a free will that wants to appropriate the thing cannot confer property rights upon it. The reference that Hegel makes in §62 suggests this understanding.

respect means that the self has the ability to put the thing in its immediate and absolute sphere of individual power. The sphere of individual power here as the case was with in Locke is exclusionary. It is always an individual sphere; however, and this is of vital importance to our argument, as we are going to see further on, for Hegel unlike the case was for Locke, this sphere is socially determined.

But as we all know the legal concept of property in modernity derives its basic meaning not only from the right of alteration, destruction or consumption of the thing but mostly from the right of the owner to the alienation of the thing. This is so, since property now exists as a legal concept within the free market that is a social and economic space that operates through the exchange of property rights. In other words through the emergence of a market economy the social meaning and importance of the concept of property lies not only in the enjoyment of the thing by the owner but also upon the possibility of its exchangeability. In a free market economy things should be able to circulate freely. Therefore the rules for the legal alienation of things are of paramount importance.

On the subject of alienation of property in § 65 of the Philosophy of Right Hegel says the following:

'It is possible for me to alienate my property, for it is mine only in so far I embody my will in it. Thus I may abandon as ownerless anything belonging to me or to make it over to the will of someone else as possession-but only insofar the thing is external in nature.' In this passage we see the limitation of the right of property as previously set by Hegel being reiterated here albeit in a less determined form. The qualification of the thing being external in nature determines the boundary between the self and its externality. In a similar vein as Locke Hegel here is not only determining the ambit of the legal right of property and of its alienation, but rather delineates the sphere of the self and what is inherent to it and as a result inalienable in its substance. A sharp contradistinction is therefore made between the sphere of inalienability of the self and the sphere of externality, where the latter is determined by the free will and is therefore susceptible to its power. As the case was in Locke Hegel draws a sharp line between the human and the natural. Whereas the former is inalienable in its integrity the latter is always potentially an object of property. However, the object of property not only has to be external to the human but it has to be external in nature as well. As a result humanity as externality is clearly put out of the ambit of property, since the object has to be by nature external, it has to be in its

origins non-substantial in order to be alienated. In this respect as the case was in Locke the concept of property and consequently the act of its alienation can be valid only to what is related to objective corporeal externality⁷⁸. To summarise this: the self is inalienable and respected as such but whatever does not belong to the concept of the self in principle is not.

From there Hegel goes on to continue in § 66:

‘Those goods, or rather substantial determinations, which constitute my own distinct personality and the universal essence of my self-consciousness are therefore inalienable, and my right to them imperceptible. They include my personality in general, my universal freedom of will, ethical life, and religion.’ Here a sharp distinction is made: Property rights cannot possibly extend either to the person itself or to any of its constituent characteristics.

Before we proceed to the analysis of the excerpt at this point a comment should be made. Impliedly Hegel draws a distinction, a distinction that is going to guide us through our whole effort to analyse his understanding of the relation of property and labour. We have already seen that Hegel distinguishes between a sphere of personality that is autonomous and self-determined, a sphere that belongs to the self and is integral to it, and nature as the objective world that can be domesticated by the human will. Although we have not encountered it yet it should be said that the idea that underlines this notion is that of subjectivity, that can be established on the basis of the social recognition of this individual sphere of power and a sphere of domesticated externality that is nameless and mute and can derive a meaning only through the determining action of the human free will. This means that the self of the other also creates this individual sphere of power for him/herself that has to be absolutely respected in its integrity. The violation of this sphere ensues in domination. The freedom and the integrity of the personality as it exists in the doctrine of abstract right is an absolute presupposition for the next dialectical step that Hegel’s builds on abstract right; that is the moral point of view where the will that in this sphere of inviolability that we have described exists in itself becomes for itself; something that ‘sublates’ the person into a subject (§ 105). On the practical level the political and legal dimension of the notion of subjectivity demands the inviolability of the person if

⁷⁸ There is a differentiation to what it concerns property upon products of the intellect, or what in our terminology would call intellectual property rights. However, even in this case the products of the human intellect have to acquire an objective external form. See Hegel § 68 of the Philosophy of Right.

it is to have any meaning. It should be stressed that at this point we only have the foundations of the concept of subjectivity. The relation of subjectivity to labour has already occupied us in Locke and is going to occupy us again further down in this chapter where are going to analyse it in its full implications. So for the time being we will leave the issue pending having just introduced it here.

In this excerpt Hegel does not simply describe human personality as inalienable but moreover he defines what dialectically constitutes the individuality of the personality as inalienable. This is so since for Hegel the characteristics of the personality are not just static contingent attributes. Even more than predicates they rather are constituent conceptual stages that through a dialectical process form the personality. They are as Hegel put it substantial determinations that constitute the essence of the person. If such characteristics were alienable then the personality would be groundless and contingent. The dialectic of self-consciousness would be incomplete in its outcome. But it was Hegel himself who taught us that labour not only belongs to the essence of personality, not only belongs to the essence of self-consciousness it rather is its most fundamental, its most essential constitutive part.

Therefore since labour as a constituent part of self-consciousness, is inherently inalienable from the self, it should be placed outside the gambit of what can be the object of property and exchange. It 'belongs' to the core of the inalienable sphere of personality. The Hegelian analysis shows us that labour cannot be understood through the logic of property. The principle of self-ownership receives a firm rebuttal here. Property as a concept is valid only for things of corporeal externality and not in what concerns the personality. The relation of the self to itself is - as the dialectic of self-consciousness has shown us - an ontological condition and as such it evades the logic of the appropriation of externality of nature by man. In other words labour is a constituent part of the self it does not belong to the self as if it was the possession of something external. For Hegel man is his labour he does not possess his labour and as such he cannot prima facie exchange it.

On the subject, Hegel goes on to say in §67.

'I can alienate individual products of my particular physical and mental skills and active capabilities to someone else and allow him to use them for a limited period, because, provided they are subject to this limitation, they acquire an external relationship to my totality and universality. By alienating the whole of my time, as made concrete through work, and the totality of my production, I would be making

the substantial quality of the latter, i.e. my universal activity and my actuality or personality itself, into someone else's property.'

It is the same distinction as discussed above (§61) between the substance of the thing and its use; just as use is distinct from the substance only in so far as it is limited, so does the use of my powers differ from the powers themselves and also from me-only in so far as it is quantitatively limited.'

In this excerpt Hegel tries to set the limits within which the system of social labour does not violate the freedom and the integrity of the individual worker. After having defined property as the whole use of the external thing in its totality and substantiality in contradistinction to its mere use that does not touch the substance of the thing (§ 61 of the Philosophy of Right), in this paragraph he suggests that such a distinction can be valid for the expropriation of someone's labour. Here Hegel draws an analogy between the mere limited use of the external thing that does not determine it in its substance and the mere limited use of the person's labour that does not determine it in its substance either. As we have seen it is the determination of the substance of the thing by the free will that eventually makes it an object of property. We have seen that property upon the thing has as consequence its existence according to the purposes and needs of the will. This hetero-determination would relegate the person of the worker to an external object that as we have seen is '*something unfree, impersonal and without rights*' (§42). On the other hand the ground of this particular analogy makes somewhat obvious (and in spite of what Hegel said in the Phenomenology) that the intellectual treatment of labour here, is one that does not differentiate it in its essence from a thing. Labour (but not the labourer) becomes here something that could be treated as a thing since it is perceived by Hegel with the same rationality as the conceptual determination of the concept of property. As a result the integrity of labour is endangered.

On the other hand we can see that Hegel in drawing this analogy tries to protect labour in the person of the labourer from hetero-determination and therefore from its relegation to an external object that can be the object of a property right. The argument that Hegel deploys here is twofold: On the one hand he states that the worker can alienate individual products of his/her skills and abilities without having the integrity of his/her personality violated. In this case the person exchanges the products of its skills, as they are the outcome of its work and hence an expression of

his/her personality⁷⁹. We can see no violation of the personality of the worker here since what s/he exchanges (in the form of the product of labour as it takes the form of an object) is indeed external from the person. The other strand of the argument has to do with the time limitation of the use of the skills and abilities of the worker. Here the analogy drawn is quite mechanistic in a sense. Hegel recognises that a person by alienating the whole of his/her time as made concrete through work, and the totality of his/her production, would be making his/her universal activity and his/her personality into someone else's property. This difference for Hegel makes a contradistinction between the ownership (and hence the hetero-determination) of labour and its mere use. This limitation can be seen as inadequate on the following grounds: First of all as it has been explained the difference between ownership and use of a thing has not to do with the degree of its use but rather with the determination of its substance. If the free will determines the substance of the thing then it is its owner. If it does not, but nonetheless uses it, it may have some legal right upon it but not that of ownership. In our case the essential element that decides the fate of labour is the source of the determination of what it is. If this is decided by the free will of the labourer then the labourer has not lost control over it. Labour has not become external to him/her and the labourer has not lost anything from her/himself. S/he is free. If it is decided by another will, then s/he is not. The time limitation is not decisive.

In a sense we could say that what we have in this paragraph we have the introduction of the idea that labour can be alienated from the labourer. The relation of the self to its labour now becomes uncertain. Labour is still the inherent formative force of the self but from now on it stands in an ambiguous position in relation to it. What Hegel had to battle with was the exactly the fact that labour in capitalism exists under ambiguous premises. On the one hand it has to be separated from the labourer so that it can be put in use by the emerging capitalist industry⁸⁰ and on the other it has to be inherent to and inseparable from the labourer since s/he is the latter that as the free subject-citizen creates the social-institutional realm of freedom. What we have discovered in this passage is the antithesis between the use and the substance of

⁷⁹ Gadamer (1976) p.71

⁸⁰ Here we can see the pure conceptuality of Hegel's thought being tainted by the demands of bourgeois society.

labour an antithesis that as we are going to see later in the thesis stems right from the nature of labour in capitalism⁸¹.

This brings us directly to the issue of the exchange of labour and hence to the issue of contract. Hegel says in § 71 of the *Philosophy of Right*:

‘... Existence, as determinate being, is essentially being for another. Property, in view of its existence as an external thing, exists for other external things and within the context of their necessity and contingency. But as the existence of the will, its existence for another can only be for the will of another person. This relation of will to will is the true distinctive ground in which freedom has its existence. This mediation whereby I no longer own property merely by means of a thing and my subjective will, but also by means of another will, and hence within the context of a common will, constitutes the sphere of contract.’

In the remarks to this paragraph Hegel goes on to say:

‘Contract presupposes that the contracting parties recognise each other as persons and owners of property; and since it is a relationship of objective spirit, the moment of recognition is already contained and presupposed in it.’

In this excerpt we can see the connection between the *Phenomenology* and the *Philosophy of Right*. What is of significance here is the transposition of the relation of recognition from the pre-social cognitive sphere into the system of abstract right-private law. In the case of contract a process of recognition that makes property rights

⁸¹ An important clarification should be made at this point. Hegel in an addition to §67 says that the difference that is introduced in the above mentioned paragraph expresses the difference between a modern day labourer and a slave, since for the latter *‘the entire scope of his activity had been alienated to his master.’* I consider that the difference runs far deeper than this. In the first instance and by using Lockean terms we could say that slavery is the negation of self-ownership. In slavery the power of the master does not only rest upon his property upon the abilities and the skills of the person of the slave, it extends to the bodily existence of the slave. For example, in Roman law the slave was a *res*, an external corporeal thing that could be the object of ownership like any other object. The slave had no personality. S/he was considered as human only in the biological and not in the social sense. Through submission to the condition of bondage the slave was considered to have lost, to have been deprived of an essential part of his/her humanity. See Aristotle (1946) pp. 9-18. In other words the relation of slavery affects the humanity of the slave in a far more fundamental way than the complete appropriation of his/her skills, abilities and time. In the case of wage labour the situation is quite different. The relation is established through an act of consent on the part of the labourer. The free will of the labourer is not negated. Additionally, the employer has no right over the employee’s body. The free worker in no way loses his/her legal personality. It should however be made clear that we are not interested here in finding similarities and differences between wage labour and slave labour. This is not within the purpose of our enquiry. What we are merely saying is that the differences are far deeper and far more essential than the one that Hegel has described. This allows us to avoid future misunderstandings about the nature of generalised wage labour. It should be made clear that it cannot at any point be claimed that wage labour has any similarity to slave labour. The prevalence of the system of wage labour in modernity and the establishment of the system of civil rights makes such comparisons pointless and even nonsensical.

socially valid takes place. However, recognition here has a distinctly different meaning than in the *Phenomenology*. Within this context the process of recognition between Ego and Alter takes place not as desiring consciousness to desiring consciousness with the aim of attaining self-consciousness but rather as property right holder to property right holder with the aim of attaining political subjectivity. Similarly, as in the first case recognition presupposed the realisation of the identity of the self through the other, in the second subjectivity presupposes the recognition of the identity of the person qua property right holder by the other. Exchange for Hegel is conditioned by the presupposition of recognition. The requirement of recognition however entails the rejection of property as an inseparable predicate of the pre-socially existing self. Property as a concept and concrete property rights upon things do not occur pre-socially as the case was for Locke, but only within an institutionally organised society. For Hegel, in order for property to have a meaning within bourgeois society it has to be recognised by another will⁸². From the moment that property enters the realm of civil society it acquires an overarching social dimension and hence an overarching social meaning that essentially determines it as a social institution rather than as an individual predicate. Property becomes a social and not an individual category. It may still belong to the individual sphere of power, but the crucial factor here is that this individual sphere of power now becomes valid not as a natural but rather as a social fact. In other words, property means nothing before it is recognised first as a valid social category and then as a specific legal right upon a thing⁸³.

⁸² On this issue Hegel is close to Fichte, who considered the right of property on a particular object as valid only from the instance of its recognition by the other. Even the more so the validity of the property right on the specific object for Fichte extends only to those who recognise it as such. See Fichte (1970) pp. 182-183. It is interesting to mention at this point that Fichte makes a distinction between the right to acquire property in general that is dependant on the formation of it and on its subsequent subjection to the person's purposes and ends Ibid. pp.166-167 and to the validity of the property right on a specific thing that is dependant upon the recognition of other individuals. We only mention this here since the science of Rights has been a major influence on the formation of the Hegelian theory of property.

⁸³ We should not forget that in a society that functions on the basis of general and free exchange of property rights, property would be meaningless if it was not protected by a general and abstract system of rights that delimits the legal relation between property holders. Both the notions of exclusion and exchange presuppose the presence of the other. Even the more so they presuppose the recognition of the validity of the exclusionary zone of the personality and consequently of the validity of the property right as this exists within this sphere of the personality. Without this, the property right that is received in the act of exchange would be groundless. In this respect the introduction of the concept of the common will in connection to the act of recognition of property rights allows us to see the social significance of contract. This significance lies in the fact that through contract we have the emergence of the understanding of civil society as a society that receives its coherence through the mutual

We can see now that for Hegel civil society is a condition of mutual recognition of subjectivity, a subjectivity that is delineated not only by property but also by the fact of its recognition as a bearer of legally recognised rights in the sphere of determination of the common will. In this respect contract not only provides a justification for the alienation of property but also the basis for the justification of the concept of the legal person, which in its turn provides the basis for the justification of contract. This is so since it is the legal person as property right holder that enters into legal relations. In this respect we should see the legal person as a conceptual abstraction⁸⁴ that is determined as the subject of rights and duties in the sphere of the determination of the common will. In other words the legal person derives its meaning from its legal relations to others as these are recognised and perceived by this common will. As a conclusion we could say that contract as a form of social contact in the last instance has an overarching social function and determination.

To return to the issue of the contract in relation to labour we see that when Hegel tries to define the different forms of contract, he classifies the contract of wages as a form of the contract of exchange and by following the same reasoning; in §80 (B-3) he gives the following definition: *'Wages contract; alienation of my output or services for a limited time or some other limiting condition.'*⁸⁵

This description allows us to continue our analysis in reference to § 67 of the Philosophy of Right where the limits to what is exchangeable in what concerns labour are drawn.

What is interesting in this case, is that Hegel seems to realise albeit indirectly that the labour relation is not a straightforward case of exchange. It possesses certain characteristics that make the imposition of the exchange paradigm problematic. The concern that seems to come out of the text is that somehow the contract for wages should be in general limited as a potential threat to the integrity of the personality of the worker. Apart from the temporal use of labour, the phrase *'or some other limiting condition'* leaves us with many questions. What could such a condition be? Is not the limitation of time an adequate means for the preservation of the labourer's integrity?

When dealing with §67 we have seen that it is not. What we have said there was that the substantial criterion is the right of the determination of labour. If we conclude

recognition and exchange of property rights as products of labour. In summarising this we could say that contract provides bourgeois civil society with its cohesion.

⁸⁴ See for example Kelsen (1992) p. 48-49.

⁸⁵ Hegel in the end of the paragraph makes a direct reference to § 67.

that through the contract of employment labour is actually hetero-determined then the time or any other limitation whichever this might be is trivial. But before we proceed to this we have to contextualise our analysis in reference to our findings in what concerned §67.

The one thing that can be said with relative certainty at this point and having in mind the comments that we made in relation to §67 is that Hegel realises that the integrity of the worker is indeed threatened by an unqualified contract for wages. This may be so since in this case we have an obvious contradiction between the *Phenomenology* and the *Philosophy of Right*. If we accept the understanding of labour in the *Phenomenology*, then labour as a constituent part of the self should by definition be placed outside the sphere of exchange. Labour cannot be exchanged as a force but only as embodied in its product. An agreement that would involve the exchange of labour power as such should be totally unacceptable, as it would relegate labour to a thing. A contract for wages could not therefore exist. However, if such a position was to be upheld then the capitalist system of labour could not possibly exist either. Hegel finds his way out of this paradox by making a sharp definitional distinction. What the labourer alienates is not his/her mental and physical skills and active capabilities but rather certain of their individual products and this only for a limited period (§67). It is not the ability of the self to create what is being exchanged but rather the product of this ability as it is externalised and embodied in the product of labour. In this case the inviolability of the personality of the labourer is not breached, since labour remains his/hers, in the sense that the activity is determined by him/her. The question that emerges is how adequately this captures the modern relation of employment. My point is that it does not. This description rather fits to a modern legal understanding of the contract for the provision of services, particularly as it applies to highly skilled, highly individualised professions. It preserves the worker's integrity only to the extent that her/his skills are recognisable and identifiable as hers/his. In other words, it can be valid only when the worker can produce identifiably individual products. It cannot apply to a condition of commodified labour for the individual ability should be reflected and identified in the individual products. However, as we are going to see commodified labour is by definition generative and abstract⁸⁶. The worker does not exchange his/her product but

⁸⁶ See the next section of this chapter.

rather her/his undifferentiated and abstract labour power. Moreover Hegel's limitation presupposes and demands the control of the working process by the worker. However, as we have said the determination of the labouring act is done by the employer with the employer having no control over the working process whatsoever⁸⁷.

To return to our main line of enquiry our objection to the assertion of §67 is that the limitation of the use of the labourer's skills by someone else does not alter the fact that even for that limited period the labourer does not have control over his/her abilities. The contract here is not for the individual product of someone's abilities but rather for undifferentiated labour power. The worker does not contract for the exchange of his/her product qua external created thing but rather puts his/her abilities to the service of another person so that s/he can use them for his/her own purposes. In this way s/he consigns her/his creative self to the control of someone else. The action of the labourer, the employment of the labour power is not determined by the labourer him/herself but by the employer. In this respect we have a loss in what concerns the integrity and the free development of the employee's personality since this process as we have seen is largely determined by the free expression of the creative force of labour. Here this creative force is not freely expressed but rather mediated and dominated by another will. The self for the worker is no longer 'for' itself but rather 'for' another. In this way the free will of the worker that for Hegel should be inviolable in its expression by the act of exchange of its labour power is constrained. We can see now that through the exchange of labour power we have as a consequence the objectification of labour in the loss of the integrity of the personality of the labourer. Labour from now acquires neither its meaning nor derives its substance from itself, but rather through the determination of another will. It no longer serves its own ends but rather it is put in use for the ends of someone else⁸⁸. In other words it attains the characteristics that Hegel himself has described as pertaining to a lifeless external thing that is susceptible to hetero-determination. As a result of this, labour belongs to this sphere of corporeal externality that as we have described above is opposed to the power of the subjective free will and is susceptible to its power and determination. As the case was with the thing, now it is the subjective will of the

⁸⁷ As we are going to see in the last chapter of this project the conflict for the control of the working process is one of the most significant features of modern work organisations.

⁸⁸ Although we are going to see in another part of the project that it does so indirectly. As we are going to see a distinction should be made between the existence of the free will in the act and the motivation of the act of the free will.

capitalist employer that determines what labour is. The employer now has the power to determine whether labour is creative, meaningful, repetitive or mundane. S/he determines its substance as an activity. And above all s/he determines what the labourer will do with his/her skills and abilities. In this sense we have a reversion of the original relation of exchange. Instead of being the skills and abilities as reflected in the object of labour that determine the content of exchange it is the process of exchange that determines the skills and abilities of the worker⁸⁹.

To return full circle to the main stream of our enquiry: The hetero-determination of labour in capitalism albeit in a totally different dialectical level returns us to the basic premises of the dialectic of the master and the slave. Through the generalised system of employment we have a complete reversal of the premises of the dialectic of the master and the slave but in this time within the confines of civil society. In the first case the original condition of domination and inequality is reversed when the slave is liberated by the original condition of domination through his labour. Labour in the dialectic of self-consciousness is not only a formative force for the self and a source of knowledge that mediates its relation to the external world; moreover, it is the force that emancipates the slave from domination. In the second case within bourgeois society we have an original relation of at least formal equality between individuals through the general recognition of the status of the legal person for all. However this condition is reversed when through the system of social labour we have one will that is in the position to dominate another will. We can speak of domination in this case because, as we have seen, the subjectivity of the one is determined by the other. The labourer is hetero-determined since one most crucial instance for the formation of his/her personality, namely his/her labour power is hetero-determined.

What should be stressed at this point is that contract is not the source of the alteration of the character of labour. It was the emergence of the capitalist economy that was the cause of this transformation. The contract of employment in its present form provides the legal justification of this new condition. Therefore, before we proceed to the analysis of the perception of employment under the rule of the legally mediated exchange we should address the nature and the condition of labour in

⁸⁹ It should be mentioned, that through the time limitation Hegel introduced albeit in a rudimentary form a vital distinction that has existed throughout modernity. This is the distinction between the sphere of labouring activity that is hetero-determined and suppressive and the private sphere of the individual that is autonomous and self-regulating. In other words the time limitation that Hegel introduced expresses the fact that the person despite its subjection to the authoritative form of employment preserves a sphere of freedom that extends beyond it.



modernity. Capitalism brought about a fundamental change in the practice and organisation of labour, a transformation that in late modernity still determines the essence of employment as exchange. As it is more than well known the thinker that best described the transformation of labour and employment in capitalism is Marx. Therefore in order to contextualise our findings so far in reference to the system of social labour in modernity a brief account of the aspects of his work that are of relevance to this thesis is absolutely essential.

5. Marx and the Commodification of Labour

As is well known Marx was deeply influenced in the development of his philosophical system by Hegel. However, and although Marx was par excellence the thinker that established the significance of labour as a most important form of human practice, for him unlike as we hold in this thesis, work was the most fundamental constitutive feature of the human self.

In his own words and in commenting on Hegel

‘Therefore the greatness in Hegel’s Phenomenology and its final product, the dialectic of negativity as the moving and creating principle, is on the one hand that Hegel conceives of the self-creation of man as a process, objectification as the loss of the object, as externalisation and the transcendence of this externalisation. This means, therefore, that he grasps the nature of labour and understands objective man, true, because real man as the result of his own labour’⁹⁰.

However, Hegel built on the universal character of labour as an essential trait of human practice; as such labour exists as an inherent characteristic of the self. What Hegel has shown is that labour belongs to humanity and exists as inseparable from the self as of a condition that is independent of its actual expression in various social formations.

⁹⁰ Marx(1977) p.101.

For Marx, labour cannot be perceived outside history, it is inalienably linked to historical expression. It is a universal condition of the species – being always caught up in historical expression.

For Marx '*Work is the eternal natural condition of human development...Hence the universal features of the labour process are independent of every specific social development*'⁹¹. This means that the character of labour as a universal 'natural condition of human development' transcends the confines of any particular historical understanding of labour. In other words, labour as a creative force belongs to the human species. However, labour as a natural human attribute receives its actual and concrete form in an actual mode of production; its character may be transhistorical but its expression is always historical.

The question then is in how is this character of labour realised within any actual form of relations of production. The gigantic task that Marx assumed was to analyse how the relation between man and labour is realised in the capitalist organisation of production. What Marx eventually proved to us was that the capitalist treatment of labour -its commodification- eventually ensued in the divestment of its power as a creative force. In other words, what Marx showed to us was that capitalism through the commodification of labour managed to put a price on something that by its nature cannot be subsumed under the logic of price setting. It is the trace of commodification that we are going to follow next.

We have seen in the previous sections that through the contract of employment we have the first instance of the objectification of labour. Labour can be externalised from its original 'owner' and be voluntarily exchanged per se and not in the form of its product. The basic idea that underlies the schema of exchange is that labour in capitalism is treated as if it was any other commodity that is freely exchangeable in the market

On another level we can see that one of the most important contributions of Marx to the understanding of capitalism was the contradistinction between on the one hand of the use value of an object and on the other its transformation to a commodity that is economically determined and realised as an exchange value in circulation in the free market⁹².

⁹¹ Marx (1976) p. 998.

⁹² Amongst his other works see Marx (1976) pp. 125-177. Moreover and it is quite interesting, the distinction between exchange and use value was not a discovery of Marx. On the contrary it had been

In what concerns our enquiry since labour itself has become a commodity it exists not as a producer of objects that are of use to humanity but of commodities that are exchanged for the benefit of their capitalist proprietor in the free market. Labour for the labourer like every other commodity in capitalism is realised as exchange value. This means that labour may exist as a use value for capitalist production (in the sense that s/he has an actual function for the production of wealth) but for the labourer it is just an exchange value since the wealth that is produced is realised as an object for the market and as such is external to him/her⁹³.

The main characteristic of the capitalist understanding of labour is its reduction from a most important predicate of the self to an object of exchange. What we are going to argue next is how through this transformation capitalism deprived labour of its human-social character and subjected it to a logic that degraded it to a simple object by attaching a price to it.

What should be stressed at this point is that our objection is not guided towards the economic dimension of labour. Labour as the producer of social wealth⁹⁴ will always have an economic dimension attached to it. The degradation of labour is not a result of economic action -such an assertion would contradict the nature of labour itself, with Marx being the first to denounce any such position- but the use of labour by the capitalist economic system. The problem with capitalism is that under capitalist conditions the economic determination of labour under the guise of legally mediated free exchange of property rights overdetermines its human-social character and incorporates it in the rationality of the free market exchange.

Marx described this process under the notion of the subsumption of labour under capital. Subsumption for Marx first of all exists as formal subsumption in the sense that is the *'takeover by capital of a mode of labour developed before the emergence of capitalist relations'*⁹⁵. Formal subsumption in other words denotes the expansive tendency of capitalism to absorb non-capitalist forms of labour and submit them to its logic.

developed for the first time by Aristotle in his *Politics* (*Αξία χρήσης* as distinct from *αξία ανταλλαγής*). This apparent 'similarity' in my view has mostly to do with the development of a capitalist form of economy in ancient Athens based primarily on maritime trade and then on the development of a sophisticated system of banking operating under capitalistic rationality. On capitalist modes of production in non capitalist societies see Marx (1976) p. 1022-1023 f.

⁹³ Marx (1973) p. 305-306.

⁹⁴ Hegel (1971) p.520.

⁹⁵ Marx (1976) p. 1021.

The complementary process of formal subsumption is what Marx has termed as real subsumption. The term denotes the intensification of the capitalist relations of production i.e. the intensification of the domination of capital over labour. As Hardt and Negri have commented, the process of the real subsumption does not rely on the outside (namely in non-capitalist forms of existence of labour) and does not involve the same process of expansion. *‘Through the real subsumption the integration of labour into capital becomes more intensive than extensive and society is even more completely fashioned by capital’*⁹⁶.

Capitalism expands and subsumes labour into its own logic both extensively and intensively. But how do these two complementary processes transform labour?

My point is that it is exactly the determination of labour by capital under the capitalist organisation of production -the paradigmatic form of it being the capitalist factory- that is the cause of the transformation of the specificity of labour into abstract labour. As Marx has said, *‘in the relation of labour as the use value that confronts money as posited as capital, labour is not this or another labour, but labour pure and simple, abstract labour; absolutely indifferent to its particular specificity, but capable of all specificities’*⁹⁷.

According to Marx the abstraction of labour occurred due to the fact that it is confronted and determined by capital that *‘as such is indifferent to every particularity of its substance... That is to say that labour is in each single case specific labour, but capital can come into relation with every specific labour; it confronts the totality of all labours δυνάμει’*^{98, 99}.

In other words it is the character of capitalist production that abstracts labour from its form as a specific activity oriented towards a specific production to an abstract, mechanical activity that unlike craft labour is indifferent to its particular form¹⁰⁰. As Marx has said *‘this economic relation... therefore develops more purely and adequately and in proportion as labour loses all the characteristics of an art’*¹⁰¹. What the labourer sells is just abstract undifferentiated labour power that is put to work according to the needs of the capitalist employer.

⁹⁶ M. Hardt and A. Negri, (2000) p.255.

⁹⁷ Marx (1973) p. 296.

⁹⁸ Potentially. Greek in the original.

⁹⁹ Marx (1973) pp 296-297.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

We can say that the crucial factor that in a sense 'triggered' the abstraction of labour and its existence according to the specific demands of capital was the technical-scientific organisation of capitalist production in the factory system. The factory system in its turn provided a form of division of labour that subsequently was adopted by the large services firms.

In the factory system or even the more so in a large service firm the product of labour has no 'author'. The labour of the worker in the capitalist factory system has deprived labour of any personal characteristics. The working process in the factory system is totally de-personified. As Marx demonstrated the division of labour within the factory deprives the worker from receiving any spiritual reward from the creative power of his/her labour, since the worker has no control whatsoever over the creative process. S/he just performs a mundane task according to the directions of the employer. Even more s/he does not create objects not even commodities anymore. S/he creates only a small part of what is to become a commodity¹⁰². The fragmentation of the production process has as a result the dissociation of the worker from the product as its creator. Consequently, the worker cannot claim any privileged relation to the product of his/her work. As a result working consciousness cannot become a creative consciousness since it loses its claim to the product as its creation. In this case the Hegelian notion of the recognition of the self for itself through labour is lost. Working consciousness cannot recognise and realise itself in its *res creatum* because the creative process has been alien to it¹⁰³. The worker can no longer say when confronting the object 'this is mine; I have created it; it is the product of myself'. Moreover s/he cannot claim in seeing the product 'this is me. My self is reflected in it.' The dimension of labour as a par excellence human creative force and as the determinant instance in the creation of free self-consciousness remains unredeemed.

Marx himself has described the loss for human subjectivity as a consequence of the dehumanisation of social labour that has transpired through the emergence of capitalism:

Never, in any earlier period, have the productive forces taken on a form so indifferent to the intercourse of individuals as individuals, because their intercourse itself was formerly a restricted one. On the

¹⁰² Marx(1976) p. 475.

¹⁰³ See Gadamer (1976) p. 71.

other hand, standing over again these productive forces, we have the majority of the individuals from whom these forces have been wrested away, and who, robbed thus of all life content, have become abstract individuals...

The only connection which still links them with the productive forces and with their own existence -labour- has lost the semblance of self-activity and only sustains their life by stunting it'¹⁰⁴.

This transformation of labour from a creative to an abstract and mundane action had severe consequences for the relation of employment. As we have seen the abstraction of labour has as a first result the deprivation of any qualities that it could claim for itself. It becomes only what the capitalist employer wants it to become. As a result the authority of the employer over the employee is totally justified under this form of relation. Labour as abstract acquires as action a specific form through a determining act on the part of the employer. Therefore the relation of authority does not only stem from the act of contractual exchange through which the employer appropriates the labour power of the employee and uses it for his/her own purpose of profit maximisation. In other words the capitalist employer in order to successfully pursue the aim of profit maximisation has to have the authority to command the labour power that s/he has purchased. It also stems from the fact that labour acquires its specificity as action through the command of the (property holder) employer that makes it actual through its subsumption into the capitalist productive process.

What then remains of the allegedly natural, transhistorical, immutable character of labour? The perception of this character radically changes. '*Labour becomes equated with mechanical energy*'¹⁰⁵. Labour apart from being subsumed to the determination of the capitalist employer is also subsumed under the scientific-technological discourse that from now on is strongly affiliated with the logic of capitalist production as embodying scientific progress¹⁰⁶. Labour under this perception becomes a technical function within a process that puts humanity in inimical opposition to nature. Labour becomes a factor in a productive process, a

¹⁰⁴ Marx and Engels (1976) pp. 86-87.

¹⁰⁵ Heidegger (1996) p. 40.

¹⁰⁶ See chapter four section 2.2.

factor that is calculated under the applied scientific-technological discourse as 'performance'¹⁰⁷.

However, the alienation of labour from the labourer and its perception as a function brings us to another issue that is of vital importance to our argument here: How does the performance of labour come to be realised in the process of capitalist production? As Marx said '*...both the means and materials of labour are used collectively*'¹⁰⁸.

*'This collective use in its turn is based on the absolute premiss of the co-operation of an agglomeration of workers. It is itself, therefore only the objective expression of the social character of labour and of the social forces of production arising from it, just as the particular assumed by this conditions, the machinery for instance cannot possibly be used other than for work on a co-operative basis'*¹⁰⁹.

In other words what we have here is the reintroduction of the social character of labour through the process of the selfsame capitalist production that originally abolished it through its objectification. We are going to see further in this chapter the full implications of this re-introduction of labour but at this stage what is of relevance is to see how this collective character is realised in capitalism.

We have seen that through contract the worker loses his/her right upon the created thing. Labour as such has no rights outside contract. However, the collective character of the capitalist production reintroduces labour as a creative force that is exercised collectively. As a result apart from his/her contractual rights that amongst other things determine the value of his/her labour as it is determined by the free labour market the worker claims a right in virtue of his/her labour as a collectively exercised creative force. These rights however, belong to the worker not qua person but rather as a member of the collective productive force. Labour in other words claims legal recognition of its productive contribution not in the name of it being the creator of objects that bear the mark of the labourer/creator but as the collective actor that creates values in virtue of its indispensable role in the 'machine' of capitalist production. Moreover, the social character of capitalist production refers it back to society. In an insightful remark in reference to the just price of labour Weber has said that where the return of labour is determined by the sale of the product in a free

¹⁰⁷ Heidegger (1996) p.41. '*What is actual is no longer that which rests and resides and subsist within itself, namely substance but rather function*'.

¹⁰⁸ Marx (1976) p.1053.

¹⁰⁹ Ibid.

competitive market, the content of the right of the individual worker to the full value of his product is meaningless, for there can be no '*individual yield of labour*'. Thus the claim of labour becomes a collective claim for a wage that can guarantee '*a standard of living as determined by a traditional need*'¹¹⁰. In other words the 'real' value of labour in a capitalist economy is of no relevance. The value creative power of labour as such cannot be quantified and be objectively expressed in terms of money¹¹¹. Even in the case of the free creative labourer the amount of the value of the labour in the form of the exchanged product cannot be predetermined. There cannot be an objective amount of what labour deserves and this has to do with the fact that it is not only a collective performance but moreover an action that as we have seen above is based on the collective knowledge and experience of a working community. As such it is impossible to assess in economic terms the value of any individual contribution. Moreover Marx as the thinker that par excellence believed that labour belongs to society thought that the products of labour should be given to people according to their needs and not according to their contribution to the production process¹¹².

6. The Multidimensionality of the Employment Relation

What we have done so far is to start from the 'phenomenology' of the employment relation in its conceptual form and have moved to its expression in the system of social labour. We have analysed employment as an exchange relation and have discovered that the treatment of labour through the contract of exchange provides a plausible justification for its hetero-determination by property, which in capitalism takes the form of property of capital. We have seen that in capitalism labour is not treated as a fundamental characteristic of the self, but rather becomes an objective quantifiable force that is calculable through its function in the system of the capitalist market economy. As we have seen this entails the subjugation of labour to the ends and purposes of capital. What we are going to attempt next, is to unveil that

¹¹⁰ See Weber (1978) p. 872.

¹¹¹ On the stifling effects on economic development of the attempt of medieval guilds to determine the objective value of labour see Simmel (1978) p. 317.

¹¹² Characteristic is the famous dictum from the Communist Manifesto. '*From each according to his abilities to each according to his needs*'.

the true character of the employment cannot be expressed under the exchange paradigm. We are going to argue that employment in capitalism is a relation that exists under ambivalent premises, namely as a relation simultaneously on the one hand of domination and conflict and on the other of interdependence and cooperation.

6.1. *The social character of labour*

The critical point that is emerging concerns the collapse of the social phenomenon of labour into its economic expression in capitalism. The issue that emerges again and again is that of the tension between the economic use of labour and its human and social character. Any understanding of labour in modernity will have to compromise between its social character and its economic use. Our main point is that the one is irreducible to the other and that therefore the tension between them can at best be accommodated but never resolved.

By way of clarifying this important insight let me take Clauss Offe's three theses against the commodification of labour: **1) it does not arise for the purpose of saleability 2) it cannot be separated from its owner and 3) can be set in motion only by its owner**¹¹³.

Let me say something about each of these:

Labour does not arise for the purpose of saleability.

The negative assertion that labour does not arise for the purpose of saleability implies a positive one: that labour does indeed arise for a certain purpose. If it is not saleability then what it is? The purpose of our excursion into Hegel and the *Phenomenology of Mind* was to answer that question. The saleability of labour must be perceived as a transformation of labour that has as a consequence its alienation from its original purpose and meaning.

The second assertion seems more simple and straightforward than the first but yet is far more intricate in its implications. **Labour cannot be separated from its owner.** The first question that emerges from the excerpt is who is the owner of labour. The association of labour to a certain owner seems to imply an answer that is in a similar vein to the Lockean tradition that perceives the connection of labour to the self in terms of acquisition of property rights. However such an understanding would be

¹¹³ Offe (1984) p. 83.

beside the point. On the contrary this assertion rests on the notion that labour despite its objectification and its economic perception and the fiction of its legal treatment is not and it cannot be an object. In other words labour is treated as a thing whereas it is not and cannot be a thing. The perception and treatment of labour as a thing will always have to come up against its character as an essential trait of human practice. As we have seen and learnt from Hegel, labour inhabits the labourer as an inherent constitutive part of his/her self.

It is exactly this irreducible human character of labour that determines it as a social category. As we have repeatedly said labour is not originally economic. Habermas has remarked for example that labour has a dual character. As action it belongs to the '*lifeworld*'¹¹⁴ and is therefore determined by '*lifeworld*' discourses, when it is introduced to the economic system it is determined and calculated by the latter on the basis of its economic performance¹¹⁵. If it has to have an economic function it has to be translated in economic terms. As a result of this we have a double understanding of labour. On the one hand we have its economic understanding that quantifies and calculates the action of labour in terms of its performance for the economic system according to the latter's own standards. On the other we have its social understanding that perceives it a form of social action that satisfies human needs and desires that are not in their essence derived and determined by the imperatives of the economic system. A person does not work in order for a company to maximise its profit nor in order to raise the national GDP. S/he works in order to attain a standard of living through which as a social being s/he can satisfy her/his needs and desires. This means that labour, as an expression and thus extension of the human-social person will not cease to import its demands into the economic system. In other words the modern system of labour has to constantly balance between two different dimensions of labour: It's social-human character and its economic use. As these two dimensions are in principle irreducible to each other the claims of each of them derive their validity internally from their respective discourses and are projected upon the other as legitimate demands. On the one hand we have the indispensability of the economic system for the satisfaction of social needs and desires and on the other we have the indispensability of the person of the worker for the economic

¹¹⁴ For the meaning of the term *lifeworld*, a concept that is central to the philosophy of J. Habermas see chapter three section five.

¹¹⁵ Habermas (1987) p. 335.

system, a contribution that constantly reintroduces in the capitalist system of labour its irreducible social-human character.

On the one hand the analysis of the articulation of the relation between property and labour as legally mediated by contract brings us back to the issue of domination and conflict. We can see now that if labour is to be 'domesticated' it has to be 'domesticated' together with its original 'owner'. On the one hand the worker has to be a part of the economic system if the economic function of labour is to be workable at all. But the worker introduces into the capitalist economic system demands and values that as we are going to see later in this thesis, the employer does not necessarily recognise as valid¹¹⁶. In confronting these demands the capitalist economic system has basically three options open to it. It can either suppress them, it can come to a compromise with them and in a sense incorporate them in its function, or it can make them work to its own benefit. What it cannot do is subject them completely to its own rationality. Instead, capitalism has to strive in order to achieve the domination of labour. Nonetheless, as the economic system is the only means for the provision of social needs the social character of labour has to come through the sieve of economic rationality in order for it to be meaningful. The two dimensions are complementary and yet irreducible to each other.

In the light of this we can summarise the two main points that the analysis of this assertion has revealed to us as follows: First of all we have the recognition of the fact that labour is an original and universal characteristic of the human condition. It comes to being with humanity itself. Even if capitalism has managed to commodify labour, it cannot de-personify it: The relegation of labour to an external, quantifiable, calculable, generic object cannot alter the fact that it inhabits human subjectivity. For the economic rationality of capitalism labour maybe impersonal, but for humanity it is not.

The other point that should be stressed here is that as a result of the nature of this dual character, the tension that exists between the social and the economic character of labour is **endemic**. The economic use of labour –especially in late capitalism–, will always stumble upon the human character of labour; this means that the modern system of social labour 'suffers' from a structural inconsistency that forces it to constantly balance between the diverging demands and rationalities that inhabit it.

¹¹⁶ See chapters two and four.

This brings us the third and most intriguing assertion that in a sense is a logical consequence of the previous one: **Labour can be set in motion only by its owner.**

At a first level this assertion deals with what is a basic presupposition for the use of labour by the economic system of capitalism. Labour power in order to be productive has to be set in motion. Labour power despite its perception by the capitalist economic discourse as impersonal performance cannot be used by the economic system, without an act of the will of the person of the labourer. The satisfaction of the need of the economic system for labour power has by definition to come through an act of the labourer. The employer may determine the content of the labour as action but the labourer decides its setting in motion, i.e. the initiation of this action. In other words the labouring process depends on the motivation of the worker to work. This means that despite the domination of property over labour there is a part of labouring process that the employer has no sovereignty over. It is exactly this motivation for the performance of the labouring act that the economic system has to induce. How does the capitalist economic system achieve this? The answer comes through the system of generalised wage labour that operates on the basis of the free labour market. It is self-evident that the satisfaction of the needs and desires of the worker can come only through his/her participation in the economic system. The generalised character of wage labour offers no alternative to the worker but to set in motion his/her labour power for the purposes of the capitalist employer¹¹⁷. Under this light the contract of employment can be seen as the agreement of the employee to set in motion his/her labour power and place it under the authority of the employer that can use it for his/her own purposes. In this case we have the paradox that the domination of the labourer is preconditioned by his/her free decision to work under conditions of domination. In liberal capitalist societies, the sovereignty of the worker over his/her labour power is lost from the moment of its setting in motion but not before that. In a sense we can see contract as a legal device that regulates the terms and conditions of the transfer of sovereignty over part of the creative power of the self, rather than the content of the employment relation itself.

On another level and building on our findings so far we can say that this transfer involves nothing less than one of the most fundamental aspects of the human personality. Labour as we have said is inseparable from the worker. We have seen that

¹¹⁷ We will see the meaning of this situation following in this chapter.

so far that labour as a predicate of our being is controlled by the self. Of course the self is as we have seen in our analysis of Hegel first and foremost a social self; the self finds its final determination within the institutional social symbiosis and so does labour. This means that labour is always realised within a certain division of labour that is decided by society and as such it belongs to society¹¹⁸. As we have previously seen labour cannot be realised 'monologically'. However, as we have already said labour in modern liberal democracies cannot be directly coerced. The principle of individual autonomy as it is enshrined in a manner of ways as a rule of our legal culture does not allow this. Nonetheless, it is up to the self as a social self to decide whether his/her labour should be put in motion or whether it should stay idle. No one has the legal right to force him/her to work. The labouring act has to come through a free decision of the labourer, even if this decision means putting it under the control of another. And it is exactly the manner of the way that is put into action and the status of this 'other' that the social division of labour decides. In antiquity where slavery existed, the 'other' was the slave owner; in the middle ages, where labour could be forced through serfdom the other was the feudal lord. In capitalism - where labour cannot be forced- the other is the capitalist property owner. The difference is that the slave owner or feudal lord had the power to impose upon the labourer the obligation to work, whereas in modernity the capitalist employer has to induce an act of the free will of the labourer so that s/he can use it.

What we have argued so far is that labour as something constitutively human cannot be subsumed under the logic of the contractual exchange of property rights without the infliction of a fundamental loss. This is so, since this schema divests labour of its human and social characteristics and reduces it to a simple, exchangeable commodity. However, labour resists its containment: It is not and cannot be a commodity; it is only capitalism treats it as if it were one. This treatment that stands on a series of abstractions that may make the schema of exchange stand, but eventually this perception has to come up against some the fundamental characteristics of labour; characteristics that attach to what is a certain 'surplus', its nature as creating tensions and ambiguities that the format of exchange can neither settle permanently nor suppress without a remainder.

¹¹⁸ Gadamer (1981) p. 75.

Our point is that the multiplicity and complexity of employment is the outcome of its ambivalent character as both an economic relation and a social and human action where diverging rationalities are expressed in a conflicting manner.

6.2 Exchange and Employment as a Relation of Conflict and Interdependence

The question that therefore emerges is how the multidimensional character of employment can be perceived through an approach that transcends the limits that the paradigm of exchange of property rights has set.

Our starting point is the authoritative and hierarchical dimension of employment. Unlike most contractual relations the employment relation is usually of indefinite temporal horizon and is exhausted neither in a single act of transaction nor to the completion of a simple undertaking. Of course there are other forms of contract that are of long even indefinite duration (for example contracts for the lease of property, insurance contracts etc.) but unlike the contract of employment they do not presuppose a hierarchical relation of authority between the parties. In this case, we can speak of power positions in the case of lease of property or even in insurance contracts but we could not possibly speak of authority¹¹⁹. However, the presence of authority is an inherent characteristic in any relation of employment. Moreover, authority is something that in the case of employment is extended over time. It is not of a temporally limited horizon. Additionally, this authority is not only dictated by the needs of a specific task to be performed. Its justification apart from practical is also ideological. It is imbued in the nature of the capitalist understanding of the relation between property and labour. To recapture what we have found in our analysis of Locke's theory, in any version of capitalism, property as a higher order value has the right to command labour.

However, in the modern system of social labour this relation is an actual social relation of permanence between ego and alter that due to the system of generalised wage labour determines the terms and conditions of the social existence of the parties. It cannot be seen as an abstract and contingent relation that can be described in the terms of exchange of skills and resources for the completion of a specific task, as the liberal contractual doctrine would have us believe.

¹¹⁹ For contractual solutions to this problem see especially Macneil (1979) chapter four.

The temporal openness of the employment relation provides us with another insight into the understanding of employment as an exchange relation. We have previously said that the employment relation is not finalised in the instance of its legal formalisation through contract. The conclusion of the contract is only its founding instance¹²⁰. In other words contract provides the legal justification for the employer to use labour for his/her own purposes and under the command of his/her authority. On the other side the employee's performance in the contract of employment requires the allocation of his/her creative power to the authority of the employer in return for the wage. In other words the assent of the worker that is given through the conclusion of the contract becomes the source of the legitimation of the authoritative content of the employment relation. As a result the employment relation is transformed from a constant power relation to a legal one that is completed only in one instance, namely the instance of the conclusion of the contract. In this sense the legal understanding of labour as exchange, ossifies the relation and recognises as its content only what has been explicitly agreed in the instance of its establishment. Whatever may transpire from that point on that has been left undetermined in contract is simply regulated unilaterally through the authority of the employer. The dynamic that the relation develops from thereon is not recognised as being in need of a normative arrangement that is mutually agreed between the parties. However, it is this dynamic that in a sense provides the essence of the employment relation. In this respect the dynamic of the normative aspect of the employment relation is simply left underdetermined by contract, and as such normatively interpreted and decided by the unilateral authority of the employer¹²¹. Employment from there on should be seen as a temporally open and normatively evolving relation that derives its meaning from the constant interaction between an employer –as s/he represents the category of property- and an collective employee that within the relation are in conflict with each other mainly for two reasons, firstly due to the distribution of resources as they are produced within the relation and in due to the conflicting rationalities of the economic and the social that guide the action of the parties within the relation. This conflict of rationalities coexists and in a sense delimits the conduct of the conflict over resources. For the economic system the remuneration of the worker, that represents his/her consideration in the

¹²⁰ It is in this sense that contract in what concerns the regulation of employment is a figment (as to its regulative scope) yet an indispensable figment in what concerns the its absolute necessity for the initiation of the employment relation through a voluntary act

¹²¹ See Collins (1993). The issue is analysed in detail chapter four.

wage contract, is considered as a cost. Therefore, the employer as a rationally acting subject has to extract from the worker the maximum amount of productivity for the minimum amount of cost, namely the minimum amount of remuneration. In a very crude outline we could say that according to the modern economic discourse it is this relation of the cost of labour to its productivity that actually determines what the level of remuneration of the worker should be and not simply the latter's subsistence¹²². But on the other hand as we have seen the worker is not guided in his/her action within the employment relation by the employer's purposes and calculations but rather from the necessity of the satisfaction of his/her needs that are socially and not economically determined¹²³. Therefore, the economic calculation of the cost of labour is irrelevant to her/him. The aim of the worker for which s/he strives through employment is to achieve the highest possible remuneration that his/her skills can claim with the highest possible degree of employment security so that s/he can continue to satisfy his/her needs through the participation in the economic system. As result the worker cannot ignore the imperatives of the economic system, since they provide the one pole that determines the nature of employment in modernity. However, the conflict of rationalities delimits for the worker these imperatives as practical limits of action. Practically, this means that the worker has to adapt to the reality that its dependence on the economic system imposes. The parties are interdependent in their conflict. They both need each other as of an imperative. However this dependence of labour on the economic system does not mean that labour must perceive economic demands as absolute imperatives as the economic system claims that they are, but rather as systemic obstacles that cannot be overlooked in the pursuance of a successful strategy in the occupational system of modernity. However, interdependence does not ensue to mutuality or solidarity but rather conditions the conduct of conflict. In all this conflict and interdependence coexist and determine each other within the relation. This means that conflict cannot receive such

¹²² Of course this comment does not have the ambition to describe the mechanism of wage determination but merely to introduce the notion of its conflictual character.

¹²³ There is an interesting issue that emerges here that however evades the scope of our research. That is that the economic system particularly in advanced capitalism has managed through mainly through advertising and social custom to control and determine the system of social needs. In other words needs are in a sense pre-emptively and artificially created by the economy so they can later be satisfied by increased production and all this to the benefit of the economic system. In this sense we could say that face a vicious circle since on the one hand the economy does demand increased social needs so that it can expand and on the other it wants to limit or at least control the resources of their satisfaction. See Galbraith (1998) pp. 124-131.

a radical form that would threaten the existence of the relation. On the other hand interdependence does not cancel the fact that the parties in the relation are pursuing conflicting interests as they are guided by diverging rationalities of action.

So far we have delineated the employment relation as a relation of domination, where the action of both as directed by conflicting rationalities is oriented towards the satisfaction of conflicting yet interdependent interests and needs. Moreover we have seen that these interests and needs depend upon each other for their satisfaction. We could say and in summarising our findings so far that employment in capitalism is the relation of the socially determined labour to the purposes and rationality of the capitalist economic system. However it would be an oversimplification to describe employment as a straightforward relation between the two opposing terms of property and labour. Of course in the first instance employment begins from the meeting, the coming together of these two terms. Nonetheless, this relation is characterised by a series of tensions and dichotomies that are produced from this ambivalent relation of conflict and interdependence. It is exactly this ambivalent character of employment as it creates paradoxes, ambiguities and tensions that we are going to trace in this thesis.

7. The ambivalent nature of employment. A Summary.

The multileveled tensions and ambiguities that are created through employment will be more systematically addressed in the final chapter of this project where we will deal with the issue of its practice within work organisations, as it is within this practice that the ambivalent nature of employment and the results it produces can be seen in their full extent. In order for this to become apparent we will try and summarise the multileveled complexity of the employment relation by attempting an analysis that commences from a schema that views employment as an interaction system¹²⁴.

The concept of the interaction system is not novel. On the contrary it has its origins in the idea that the instance of recognition creates a form of community that creates its own law that has to be abided by the two persons involved in it; this notion

¹²⁴ *'Interaction systems emerge when present individuals perceive each other'* Luhmann (1982) p.71

of the interactional community was firstly introduced in western philosophy by J. G. Fichte as early as 1796¹²⁵.

In interaction systems action is always oriented towards the attainment of a certain mutually agreed goal. Interaction systems in order to exist and be able to attain their goal have to create their own normative framework that would regulate them as action systems. The purpose of the normative framework of the interaction system is to establish a pattern on the basis of which meaning communications on the part of Ego provoke certain stabilised and anticipated reactions from Alter so that their actions can be co-ordinated towards the attainment of the set goal. The aim of the normative framework of such an action system is to stabilise expectations between the parties and enhance the predictability and stability of the action pattern. For this reason as part of the normative framework a corrective mechanism emerges that operates through the exercise of sanctions and rewards. The exercise of sanctions and rewards within the system depends on the conformity or deviance of Ego and Alter to the normative pattern of the action system and has as its aim the protection of its stability¹²⁶. Without a stabilised normative pattern any co-ordination of action between Ego and Alter that would be oriented towards a certain goal would simply be impossible¹²⁷. In this case and especially through the establishment of a stable normative framework of action we can see that we are dealing with -an albeit rudimentary- form of social organisation. We can see know the similarities between this model and employment relation in its simplest form, i.e. as a relation between Ego and Alter unfolding. Employment in this case can be analytically described as an interaction system. This is so, since we have an agreement upon the performance of a task; we have a stabilised normative framework with sanctions and rewards attached to it. However, from this point on, the differences start to emerge due to the complexity of the employment relation. In the previous interactive model the emphasis is put in the creation of a normative framework that will guide and co-ordinate the action of two actors towards the attainment of a mutually agreed goal with alter and ego being partners to it. It describes a relation of solidarity and cooperation where distributive problems are left undetermined. In the case of the employment relation things are not the same. The assumption of action towards the

¹²⁵ See Fichte (1970) pp. 72-73.

¹²⁶ See Parsons (1965) pp.105-107.

¹²⁷ Parsons (1982) p. 94.

attainment of a goal might have been agreed but it is not the same goal for both the parties. As we have described the parties see the goal from different perspectives. First of all it is the goal of the employer for which the employee has to work for. The attainment of the goal per se is *prima facie* indifferent to the labourer¹²⁸. In addition to this, power relations as they emerge between Ego and Alter in the solidary paradigm are not predetermined by the nature of the system. In the case of employment we have the *ab initio* existence of authority and right of command of one party over the other. The relation is predominantly characterised by hierarchy and authority and not solidarity and cooperation. However, the factor of interdependence of the parties complicates the system even more since it is a factor that does not allow it to evolve in a condition of open conflict that could dissolve it. Moreover, in the case of employment we have a problematic relation between Ego and Alter since they are not guided in their actions by the same rationality. The employment relation is the outcome of the compromise of two conflicting yet interdependent rationalities, namely the economic of property and the social of labour. The first problematical consequence of this comes through the fact that the guiding rationalities of the parties do not recognise each other's interests as invested in the relation as *prima facie* valid and legitimate. The validity and legitimacy of the other party's interests are not rationally recognised as such but are rather imposed upon the parties due to the fact of their interdependence. And again it is this imperative that provides the ground upon which the diverging rationalities must converge. Interdependence as a structural component of the relation 'forces' the eventual recognition of the validity and legitimacy of each other's interests in the relation. However, this recognition does not occur through the unconditional acceptance of the validity and legitimacy of the other party's interests. On the contrary the parties reserve the right to evaluate what the other party's interests are and should be according to their own respective rationalities. Additionally, unlike the paradigm of the solidary relation where the rules of action and the canons of strategic planning are mutually concluded by the parties, in this case they are diverging and conflicting as they stem from the diverging and conflicting rationalities that guide the parties in the pursuance of common yet conflicting goals. This is so since in employment we have an agreement and a

¹²⁸ Of course particularly in employment in work organisations the employee has an interest in the attainment of the goals of the enterprise as this can indirectly benefit him in the form of increased job security, production bonuses etc.

subsequent cooperation on the performance of the task but not an agreement as to the determination and the meaning of the task. In other words we have cooperation on the basis of a unity of goal (i.e. the task to be performed) but not a unity of purpose (i.e. the meaning of the task according to the interests and the rationalities of the parties). In this sense employment must not be seen as a solidary and cooperative relation but rather as a constant strategic compromise between two conflicting parties on the basis of their interdependence. In this respect we have a relation between two parts that is characterised by a structural dichotomy of incompatible and yet complementary elements that are in constant interaction with each other and mutually determine each other. These two parts of the employment relation determine and are determined by each other in the conduct of a conflict that cannot be surpassed in capitalism. As such property and labour are the two parts of a quite unique dialectic where we do not have a condition of thesis-antithesis- synthesis schema but a constant evolution and adaptation of one element to the other¹²⁹. This means that if any of the parts of employment reaches a condition where it can be self and not hetero-determined then the relation substantially changes in its very core. If labour does not need property in order to sustain itself, then capitalism as we know it will not exist anymore. What needs to be stressed here -an issue that is going to be addressed extensively in the next chapters-is that this unique dialectic is one of the most substantial components of capitalist societies. In a sense it is one of the major factors that have contributed to its success, in the sense that apart from the innovations that it brought about through the rationalisation of human action, it managed to creatively exploit conflict as a factor of social cohesion. In other words the paradox of employment and the productivity of it lies in the fact that the conflict of interests between property and labour, the incompatibility of rationalities and discourses is conditioned by the fact of their indispensability for each other.

As a product of this unique and ever evolving dialectic we should see the normative context of employment as being constantly adapted to the balance of power that exists between labour and property. We should not forget that employment is a power relation, where a dominant part exercises authority over a repressed one. This incompatibility that we talk about is not relation between equal terms. The paradox starts from the fact that this power relation stems from an action that is ambivalent in

¹²⁹ For an analogy see Merleau Ponty (1968) p.91.

itself. Labour as we have already said is the producer of social wealth¹³⁰ and as such has a function that is economic and this is a dimension of labour that cannot be reduced or denied. On the other hand labour is a fundamental factor for the creation of the social self and as a most important form of expression of human creativity. This dual character of labour stems from its own nature. The ambivalence is structural and not contingent and it expresses itself in different ways in different historical settings. The form of this ambivalence as we experience it today is conditioned by the autonomisation of social systems¹³¹ and the subsequent primacy and the subsequent social domination of the economic system in capitalism. This means that it is the submission of labour to property that in turn is dependant on labour both practically (in the sense that it needs labour for the use of the capitalist economy) and ideologically (in the above mentioned sense of its moral justification) that creates the form of the paradox of employment in modernity.

What we are going to do next is to analyse different understandings of the employment relation as they are expressed at three different social levels and attempt to see whether this multidimensionality and complexity of labour can be captured them. In a sense we will attempt to transfer our findings so far about the nature of employment and test them against dominant perceptions of it, namely, that of the market, that of the state (and its legal system) and finally that of the level of the commercial corporation where we will try and discover a legal understanding that tracks employment in modernity as multidimensional, as involving a balance between its economic and its social dimension.

¹³⁰ See footnote 93.

¹³¹ See Luhmann (1982)

CHAPTER TWO

EMPLOYMENT AND THE LIBERAL CREED

Since Paradise, labour has been the curse of possessions, but property gives a truly divine right to idleness

(Karl Renner)¹

Introduction: The dual dimension of labour and its function in modernity.

We have seen in the previous chapter that labour has a dual character as it has both a human-social and an economic dimension. As we have said these two dimensions are intrinsic to labour since labour as a fundamental trait of human practice is both a constitutive feature of the self as an action that mediates its practical relation with externality. Labour in this dimension is the instrument for the appropriation of externality whether is externality is the physical or the social world. In this respect as we have seen labour as one of the most fundamental constitutive characteristics of the social self and of the social bond. On the other hand we have seen labour is the creation of the social wealth, the action that stats the circle of economic activity. As we have said these two dimensions are in principle –originally at least- not incompatible to each other irreducible to each other they as they have co-existed historically in different ways, in different social formations. In a sense they are complementary to each other; the economic use of labour follows its dimension as one of the fundamental creators of the social bond. If we –albeit in an abstract manner- we see economy as the sphere the pursuance of the satisfaction of material needs and desires, where these needs and desires have to be satisfied through social action – in the sense of the action that is oriented towards something external- then the economic use of labour stems directly from its nature as a form of mediation with externality. However, what is specifically problematic, in modern capitalist societies is that these two dimensions are being more and more separated, more and more autonomous and more incompatible in their rationality to each other. As we have already seen in modernity we have condition where the economic dimension of labour

¹ Renner (1949) p. 104

dominates the social one. As we have said the crucial factor is the relation between property and labour in the sense that in capitalism we have a relation of domination. However, in this chapter we will not deal with principles or concepts but with actual and concrete social situations. What we will attempt is an analysis of the economic use of labour and how this violently comes into antithesis, how it distorts its dimension as a constitutive force of the social self and as a most important creative force for humanity.

Therefore in this chapter we will look at the dominant perception of labour in modernity, namely to the one that submits labour under the logic of economic exchange. Therefore we pick up the trail of the Lockean analysis and deal with the perception of employment as a form of contractual exchange. However, in this case we do not deal with the agrarian capitalism of small property owners as the case was in Locke. The common element in the early agrarian capitalism of Locke and the modern globalised capitalism as we experience it today is the predominance of property over labour, a predominance that is to a wide extent achieved through the legal protection of property rights accompanied by the legal instrument of contract of employment. It is this approach to employment and its consequences as they occur in modernity that will occupy us in this chapter. Therefore particular emphasis will be given to its main ideological proponent namely the current of neo-liberalism. In this respect we will deal with neo-liberalism as it is expressed either as libertarianism (Hayek, Nozick et. al.), that as a current of thought reintroduces in the context of late modernity the basic philosophical, legal and economic premises of traditional liberalism albeit in a different social and economic context, i.e. not the context of the early bourgeois society but in the context of modern globalised capitalism, or as the theory of economic analysis of law (Posner, Kronman et. al.) that as a more extreme version of libertarianism asserts that legal relations should be uncritically subsumed under economic rationality and that legal rules should have as their aim the maximum economic efficiency of the relations that they regulate. Due to their strong ideological affiliation and due to the fact that libertarianism and economic analysis share the same basic assumptions and the same rationality they will be treated here as a single current of thought that is expressing the perception of employment as a market relation of exchange in its most pure form. The aim is to show that neo-liberalism's treatment of employment as an act of economic exchange subsumes under a legal form that is designed to understand only one of the parts of the relation that is property. As a

result the contractual approach is bound to favour property which we should not forget is the dominant part in the relation. Moreover the libertarian perception focuses only on the economic function of labour and silences its human-social character.

As we are going to see further on the neo-liberal understanding of employment is based on a wider perception of law and morality that in its turn is based on a series of basic maxims that justify the function of the free exchange market. As we are going to see these maxims are characterised by the reliance of the theory on the notion of the self-regulating market mechanism. Therefore we will start our analysis by analysing the basics premises of neo-liberalism in what concerns the foundations of the market and we will briefly address the moral and legal implications of the theory. From thereon we will address and assess the views of neo-liberalism on the concepts of labour and the law and examine how these perceptions find their expression in labour law. Finally our findings will conclude to a critique of the neo-liberal views on employment.

1. Libertarianism: The Philosophical Underpinnings

Libertarianism is founded upon the basis of a wider epistemological and moral perception that emanates from the writings of the liberal thinkers of enlightenment. Moreover, neo-liberalism despite the obvious fact that has its internal differences as expressed by different thinkers has a coherence that can only be attributed to a common adherence to its major premises. Therefore, in what concerns employment we can discern this approach being built upon two fundamental premises, *a moral one and an epistemological one*: The moral premise is the position that individual freedom is the supreme moral and social value. It cannot be denied that early liberalism put to the fore the moral value of the individual, an individual that was until then entangled in a web of dependencies as these were represented by a series of centres of authority such as the monarch, the feudal lord or the church. Nonetheless, what was a radical idea for the 18th, has now become an indispensable premise of our moral and legal culture. However, this premise as advocated by most neo-liberal thinkers has turned into the justification of a form of radical individualism that by focusing on the notion of the individual as a free property holder, undercuts the notion of collective solidarity. The second premise is that the impersonal market order is the outcome of

rational yet unpredictable human action. As we are going to see next these two fundamental positions provide the groundwork on the basis of which the neo-liberal (or libertarian) approach to employment as exchange is constructed.

We will start with the analysis of the second assertion, namely that the free market is a spontaneous creation of rational yet unplanned human action. Classical liberalism in this respect follows the old liberal theory promulgated initially by Hobbes and Locke but moreover by the thinkers of the 18th century such as Adam Smith and by the political economists of the 19th century such as Ricardo and Malthus and the utilitarianism of Bentham who held -in substantially different ways of course- the basic position that human action is rationally oriented towards the satisfaction of basic human needs as the latter are determined by human nature. As A. F. Hayek put it much latter, free action is oriented towards the attainment of specific goals but not towards the accomplishment of substantive pre-given ideals, as they might have been preconceived by human reason². These goals according to both classical and neo-liberalism can be attained through the process of free-competitive exchange as the latter can be guaranteed by the free market. The reason for this is that the specific human needs that exist in a certain social area at a given moment are projected on the market and can be subsequently satisfied through the process of exchange. This is so since, according to Hayek, intrinsic in the market mechanism is an information system about which the actual human needs at certain point in time are, a system that guides human efforts towards certain economic sectors³. This information mechanism is associated with and functions through the price mechanism, which is an indicator for the direction of the future action of the individual market actor. In other words the price in a free market system is a signal to the participant in the market game about the direction of the latter's incessant and unpredictable fluctuations⁴. The market therefore provides the satisfaction of needs by making them known to other people. Exchange makes possible the simultaneous satisfaction of divergent and indifferent between them needs thus promoting the interests of all parties involved in it⁵.

² See Hayek (1982) Vol. 2 p.109. See also Hayek (1960) chapter 3.

³ Hayek (1980) pp. 28-29.

⁴ For example, if there is an overproduction of wheat one year, the price mechanism of the free market will inform the farmer that s/he should concentrate his/her efforts in some other cultivation.

⁵ See for example Hayek (1982) Vol.2 pp. 110-111.

The other significant characteristic of the free market is that it is always a competitive market. In the theoretical model of liberalism competition is '*the principle of social organisation*'⁶. In this respect competition functions as both a means of the optimum satisfaction of needs and as a safeguard for the maintenance of the equilibrium of power in the market order.

1.1. The individual and the market – Human nature and the market order

The ultimate legitimating criterion of the market order according to liberalism encapsulated in the famous dictum of Adam Smith that man's propensity '*to truck, barter and exchange one thing for another*' is an exclusive characteristic of human nature⁷. In this way the act of exchange that satisfies the self-interest of individuals becomes a most if not the most substantial expression of human nature⁸. We will not deal here with the validity of this position, since such an attempt far evades the scope of this thesis. Nonetheless, this assertion is of great importance to our analysis, since as we have seen in the previous chapter the understanding of employment as an exchange relation is a rather problematical. Moreover this current of thought by focusing on exchange as the primary form of human interaction- a view that in various guises has been advocated by many thinkers who were not necessarily liberals or neo-liberals⁹- has major normative consequences as it promotes a certain understanding of the nature of human action thus directly affecting the normative understanding of employment.

The naturalness of exchange has as a consequence the perception of the market as a spontaneously derived order based on a constant process of adaptation of human action through the method of trial and error¹⁰. Moreover the market apart from being spontaneous is also impersonal in the sense that there is no particular will that can determine its never-ending fluctuations. On the contrary, the market is the outcome of innumerable and diverse human actions that are oriented towards the satisfaction of

⁶ See Hayek (1944) pp.27-28.

⁷ Adam Smith (1991) p. 12

⁸ Ibid.p.13.

⁹ See for example G. Simmel (1978) and J Baudrillard (1993) who perceive exchange as a form of social interaction under a significantly different angle.

¹⁰ Hayek (1960) p. 41

their subjective needs¹¹. As such its function is contingent and ever fluctuating, since contingent and ever fluctuating are both the needs to be satisfied and the factors that shape the conditions for the satisfaction of these needs.

Moreover the schema of free competitive exchange has as precondition that any relation of interdependence (contract being the paradigmatic form) presupposes the preservation of the distinct individuality of the persons involved in it. This notion suggests that any act of exchange takes place between distinct self interests that momentarily converge, exactly in the act of contractual exchange. As a result in any interactional system that is determined by market exchange the factor that determines the structure of action is that of the mutual utility of the persons involved and for the temporal horizon that the condition of mutual utility exists¹².

However, under this line of reasoning the market becomes the natural outcome of human action, the axis that provides the basis for the development of human symbiosis. However, this primacy of the market presupposes a series of reversals. In this schema we do not have the notion of society which through an economy that has adopted the model of the free competitive exchange market, satisfies its needs. On the contrary it is the rules of the free market that have been adopted by the capitalist economy that impose their rationality upon a society that is called to adapt itself to the given reality of free competitive exchange. It is the foundation and the consequences of this reversal that we are going to address next.

1.2. The epistemological foundations of the market

This brings us to the issue of the analysis of another basic epistemological premise of neo-liberalism as has been developed by Hayek that concerns the tasks and the limitations of human reason in what concerns its understanding of and its practical comportment in the market order.

For F. A. Hayek (probably the most influential neo-liberal thinker) the practice of old rules that have emerged through experience and learning the adherence to tradition represents a third way of guiding action, a way that overcomes simple

¹¹ Famous in this respect is the metaphor by Adam Smith on the invisible hand that guides the actions of individuals who while pursuing subjective interests promote to the public good without this being their intention. Adam Smith (1991) p. 400. For a modern analysis on the issue of adaptation to the fluctuations of the market see Hayek (1944), especially chapter one.

¹² M. Weber (1979) pp. 85-86, 140, etc.

instinct and sterile rationality. In this respect tradition becomes an instrument of social evolution an evolution that is in a way seen as the adaptation to newly emerging needs¹³.

Hayek in stressing the importance of inherited successful rules made a distinction between what he called 'critical rationalism' and 'constructive rationalism'¹⁴. As MacCormick has described it, critical rationalism is based on the application of reasoned criticisms to '*inherited systems of thought and action under the basic presupposition that change within such systems can only be partial and not total*'¹⁵. The task of critical rationalism is to criticise what is structurally a part of the system on the basis of its potential for development and improvement but obviously never of radical change. On the contrary 'constructive rationalism' is that kind of rationality that by using systems of thought radically challenges these allegedly immutable principles and attempts to supplant them with its own arbitrary constructions.

This distinction has major normative consequences. For Hayek knowledge is confronted with a social world that is given in its basic premises. Therefore the task of reason is to accommodate its action towards the realities that the world imposes. Hayek did not believe that reason can uncover the 'mysteries' of the social world. It can only think that it can by creating rational systems that are in opposition to the natural laws that determine social reality.

Nonetheless, this position has an ideological twist attached to it. According to Hayek, in the case of critical rationalism we have the true individualism of the creative actor -an active and practical individualism- whereas in the second we have a futile individualism that suffers from an arrogant intellectualism that wants to impose its otherwise fallacious constructions to other individuals¹⁶. In this sense we are not even talking of a true individualism since the imposition of intellectual construction on others deprives them of their freedom to act according to their own practical understanding of the world. In Hayek's own words: '*The refusal to yield to forces which we neither understand nor can recognise as the conscious decisions of an intelligent being is the product of an incomplete and therefore erroneous rationalism*'¹⁷.

¹³ Hayek (1982) vol.3 pp. 153-176. See Glasman (1997) pp. 24-27.

¹⁴ See Hayek (1982) vol.1 pp. 26-34.

¹⁵ See MacCormick (1989) p.43.

¹⁶ See Hayek (1949) chapter one.

¹⁷ Hayek (1944) p.152.

What should be stressed here is that the world that Hayek refers to is not the physical external world that is studied by the social sciences but the social world that is the outcome of our combined actions. However, as according to libertarianism the laws of the market are natural laws and not socially negotiated norms, the methodology and the cognitive rigour of the positive sciences should provide the rule of their cognisance: These rules express natural truths that just have to be discovered. From there it naturally follows that they cannot be susceptible to criticism but rather accepted as a datum. If we want to summarise the libertarian view we can say that libertarianism advocates that a market based society (or catallactic society according to the terminology of Hayek) should be cognised on the basis of an 'is', but never criticised on the basis of a normative 'ought' that challenges its structure¹⁸. Otherwise it would be as if a physicist tried to criticise the laws of gravity as unfair.

What we mean by this is that libertarians do not perceive social norms as deriving from the need of an arrangement of the terms of the human symbiosis that is contingent in its normative demands but rather as inexorably stemming from a pre-given cognitive assumption, this being the assumption that the market order is intrinsically rational. As such a market economy based on the rules of free competitive exchange becomes the basis of social organisation. This in turn has as a consequence that the free exchange market should be the source that determines the content of the norms that govern the terms of human symbiosis.

As market order is perceived as a natural fact, any social structure that is constructed around different premises is a *contra naturam* aberration that simply has to be abolished as a creation of the limited human mind that in its arrogance wants to supplant nature with itself. Practically this means that a society that is structured around the function of the free market cannot allow 'extraneous' (in the sense of not justified by the market) demands to disrupt its function. This means that any view that contests the validity of the model of the market-based society is condemned not only a sign of cognitive fallacy but moreover a sign of moral arrogance. In this respect we can see how the otherwise unpredictable market structure is transformed into an all encompassing determining *prima causa* that causally determines the terms and conditions of human symbiosis. The laws of the market as stemming from the strict determinism of its function, a function that is beyond the sphere of human control,

¹⁸ 'A complex civilisation like ours is based on the individual adjusting himself to changes whose cause and nature he cannot understand' *ibid.* p.151.

produce norms that cannot be rejected by practical reason. Catallaxy does not produce rational, socially negotiated norms but rather cognitively ‘discovers’ imperatives that exist as natural facts. In other words, the rules of catallaxy do not derive their legitimation from a rationally accepted ‘ought’ but rather from an externally determined ‘must’¹⁹.

In this way neo-liberalism seems to suffer from an acute contradiction: On the one hand evolution is spontaneous but on the other it is guided by the unyielding laws of the market, laws that as such cannot be changed by the human will. As the notion of constructive rationalism would have it, evolution through constant adaptation might be the pattern that determines the market order but evolution and adaptation cannot overcome the structure of the market order. In other words, the notion of evolution becomes an explanatory argument for the justification the model; evolution does not affect the model which functions on the basis of well defined premises.

In this respect it cannot be stressed how succinct in noticing this contradiction was the comment made by G. Lukacs that *‘The capitalist process of rationalisation based on private economic calculation requires that every manifestation of life shall exhibit this very interaction between details which are subject to laws and a totality that is ruled by chance. It presupposes a society so structured’*²⁰.

In this way liberalism seems to have to confront a problem of ideological identity: On the one hand it presents itself as the natural heir of the ideas of the great project of enlightenment that professed the power of human reason and raised the rational individual as the supreme moral value; whilst on the other it denounces the basis upon which this moral supremacy of the individual is based, namely its capacity as a free acting person to create and maintain on the basis of reason the social world s/he inhabits. Reason in this respect is challenged in its most radical dimension as discovered by the enlightenment, namely as an instrument of critique²¹. Through the neo-liberal doctrine the reflexivity of reason is lost. Reason cannot criticise itself in its creation. The market order eventually becomes a natural-logical datum cannot be altered through rational human action. The product of reason i.e. the market-based society cannot be criticised by reason itself. In this respect human reason evades human control. As a result, the creativity of human reason, its ability to dissolve and

¹⁹ For an analogy on the rationality and the normative results of strict deterministic thought see Cassirer (1979) p.71.

²⁰ Lukacs (1971) p.102.

²¹ See Cassirer (1979).

reconstruct²² that was discovered by the philosophy of the enlightenment finds its absolute limitation in the primacy and the moralisation of the market order. This is an order that has been created by a higher order of reason that as economic rationality becomes a kind of a supreme meta-reason that provides the criteria for the validity of all social action.

We will now turn to the moral and legal implications of the libertarian position. Our main position will be that the idealisation of the market order has as a consequence the conflation of society with the market with the result of the suppression of the needs and desires of a social sphere that produces its discourses autonomously from the economic system on the basis of a rationality that resists its subsumption to the capitalist economic discourse.

1.3. The moral, political and legal implications of the market order

As we have already said, one basic position of both liberal and neo-liberal moral doctrine is the notion that freedom is the supreme moral value. Liberalism exalted the value of the freedom of the individual. Neo-liberalism supported its claims on the assumption that freedom is guaranteed in a market society, where individuals are free to pursue their self-interests unconstrained from social relations of dependency and domination.²³ It is thus that the moral dimension of the market emerges: The market is the outcome and simultaneously the protective mechanism of human freedom.

In linking the traditional individualism of classical liberalism with libertarianism Hayek defines liberty as *'the absence of coercion, or as the independence from the arbitrary will of another'*.²⁴ According to him coercion is defined as the use of individuals as a means for the ends of others.²⁵ As Hayek has put *'...freedom refers solely to relation of men to men, and the only infringement on it is coercion by men'*.²⁶ Under this perception coercion as a social relation becomes personalised. It presupposes a power relation that can be expressed only in interpersonal terms, as for example it existed in antiquity between the slave owner and the slave or in feudal times between the lord and the vassal. Coercion can characterise human action only in

²² See Hardt and Negri (2000) p.204 on Spinoza. For a general overview see again Cassirer (1979)

²³ See among his other works especially Hayek (1944) chapter one.

²⁴ Hayek (1960) p. 12

²⁵ Ibid. p. 21

²⁶ Ibid. p.12

so far as other individuals attempt to direct it for their own benefit. Under this definition, any form of structural coercion, social or institutional, is rendered invisible, as for example is the one from the poverty that can be generated by the market allocation of resources. However, the market order as *'impersonal'* by default cannot be coercive, since coercion can only be a characteristic of human relations. In the visible absence of a particular arbitrary will of a physical person, coercion either does not exist or it *'is deprived from its most harmful characteristics by being confined to limited and foreseeable duties, or at least made independent of the arbitrary will of another person'* ²⁷.

Eventually, under the libertarian prism, freedom becomes a market-determined concept. As the market is the institution that guarantees freedom, freedom comes to mean the unconstrained capability to participate in the market 'game' according to its laws.

As a result of the belief in the inherent morality of the market based society libertarians hold that any criticism that upholds the view that the market structure produces unjust social results is either irrelevant or the result of social envy²⁸. This brings us to the notion of justice. For example for Hayek, justice finds its fulfilment in the agreement upon the rules that regulate social action. In bridging traditional liberalism with libertarianism and building on the work of Hobbes, Hayek asserts that these rules are actually the rules of the free market²⁹. The market is the primary field of interaction of individuals. The individual through the instance of the encounter with the other does not form him/herself, as was the case for Hegel; the individual fully determined and as such pre-exists any such encounter³⁰.

Hayek's fundamental determining maxim of distributive justice, a maxim that was actually originally expressed by Hobbes³¹ is that the fair share of everyone in the social product is determined by the usefulness that one has for his fellow man. Nonetheless, this usefulness can only be assessed through the process of free exchange in the competitive market. It is the amount of money that the other, any other is willing to pay for someone's particular services which are provided in a competitive way in the free market that determines this merit. In this sense, my

²⁷ Ibid. p. 21. On the application of the definition in employment see Hayek (1960) p. 136.

²⁸ Hayek (1960) p. 93

²⁹ Amongst his other works see Hayek (1982) Vol. 2. On Hobbes see Macpherson (1962) chapter two.

³⁰ For the conception of the individual as a *homo clausus* see the excellent analysis by Elias (1978) pp.245-253.

³¹ Macpherson (1962) p. 90.

usefulness is determined by the measure of the need of the other, from the quality of the services that I have to offer, in the price that offer them in a strictly competitive environment. Through this schema libertarians attempt to dismiss the argument that the catallactic principle of distribution is egoistic, since it acknowledges the priority of the need of the other and imposes on the actor the condition of its prior satisfaction, as a prerequisite for the satisfaction of his/her own needs. Even if this as a theoretical schema may not sound absurd, it starts from a principle that understands social action as stemming from individual and nothing but individual desire for utility maximisation. The flaw of the libertarian line of reasoning lies on the fact that it attempts to construct a moral argument in favour of the market by discovering a moral dimension in a relation that is purely instrumental. The libertarian notion of the individual as a rational market actor is what determines the schema and not the intrinsic moral value of the other. In other words, the significance of the other does not lie on the integrity of his/her personality, not in his/her moral value as a person per se, but rather on the fact that my need satisfaction has to pass through him/her³². The other does not determine my action as a result of her/his intrinsic moral value but only as a means to the satisfaction of my needs. The other in the libertarian doctrine is not perceived as postulated as an end in him/herself³³. My action towards the other is determined by his/her utility to me. And in reverse order, his/her action towards me is determined by my utility to him/her.

Therefore the relation between Ego and Alter despite the methodological disdain of Hayek for utilitarian solutions³⁴ becomes a strictly utilitarian one. If Ego and Alter cannot assist each other in the satisfaction of their needs then they are at best indifferent to each other as moral entities. In this respect, the libertarian moral argument comes up against the moral framework of social interaction that it has itself established. This is so, since in the libertarian understanding of interaction the need of the other cannot have no merit irrespective from the material needs of Ego.

Moreover, as economic action is strictly purposive and instrumental, the social relations that it produces are also instrumental and determined by the ends-means schema. In other words the interdependence of individuals as imposed by the market produces a relation that is instrumental, contingent upon self-interest and with no real

³² 'The market community as such is the most impersonal relationship of practical life into which humans can enter with one another.' Weber (1978) p. 636.

³³ For the formulation of this moral imperative see Kant (1964) p.96.

³⁴ Hayek (1982) pp. 17-24. MacCormick (1989) p.50.

moral basis. As a consequence it creates a mechanical social bond where the other is not internalised as a value per se in the sphere of moral beliefs and actions. S/he remains external and morally indifferent³⁵. As a result the individual that liberalism put forward as a moral value is lost. On the contrary what remains are objective relations between actors that have no moral capacity as individuals. The market functions on the basis of formal rules that have the quality of avoiding substantive moral questions that answer to demands that have to do with moral values. On the contrary the individual market actor is perceived as someone that has limited social responsibility towards the other³⁶; a responsibility that solely lies in the observance of the rules of the market 'game'.

This notion of individualism as understood by libertarianism has as another result a deep distrust towards the notion of collectivity. For example Hayek claimed that coercion comes from the collectivity upon the individual³⁷. However, and although the collectivity can be a source of coercion upon the individual we should not forget that it can also be a source of solidarity and of moral embeddedness. Nonetheless, libertarians as a starting from the notion of the primordial self do not recognise the existence of legitimate collective interests since for them social action is always action of the free individual³⁸. In summarising we can say that libertarianism in the last instance imposes market action as the measure of morality. This approach has many implications which we will continue to trace. What we will try to show is that for libertarianism moral rules are instrumental as to the success of the market order and possess no inherent value by themselves³⁹.

³⁵ For a similar analysis on the superficiality of the morality of this kind of interaction see Durkheim (1984) pp. 334-337.

³⁶ On the notion of responsibility see Hayek (1949) pp. 17-20.

³⁷ Hayek accepts the action of groups as friendly societies but as organised actors considers it coercive (1982) vol. 3 pp. 150-152.

³⁸ We do not claim here that libertarians deny the moral validity of the existence of all collective bodies in general for such a thing would be a non factual absurdity, but even in cases where they accept the legitimacy of collective body they always perceive it as an association of distinct individuals that can never be determined in their essence by the collective body. See among his other works, Hayek (1944) 24-32. On the importance of the role of associations in a catallactic society see Hayek (1982) vol. 2 pp. 150-152.

³⁹ See for example Fukuyama (1996) pp. 158-159. His analysis although has as its aim the recognition of non-institutional, cultural variants to economic development and growth has operated within the limits of the rationality of the economic system. In his analysis trust is not seen as a social condition that stems from shared moral worldviews but as an abstract cultural factor that is exhausted as a virtue upon its contribution on the creation of large-scale corporations. Besides the fact that one may have many reservations with his analysis it is indicative that for him trust finds its limits upon its economic usefulness. On the point where trust as a social principle becomes "unproductive" is turned into some sort of a negative value.

We have so far seen the main positions of libertarianism as it concerns the moral vision that the market order produces. What we will see next is how these basic principles are applied in the libertarian understanding of labour.

2. Neo-liberalism and Labour

The basic distinction that will guide our analysis is again the relation between property and labour as it underlies the ambivalence between its social character and its economic function. We have seen so far that labour as a creative action is both economic and social and that this dual character cannot be negated. However, what I will argue is that libertarianism perceives labour strictly as an economic category thus consciously silencing its social character and its dimension as an expression of human creativity. In this respect I will argue that the libertarian view of labour due to its sanctification of property and due to its methodological individualism, whenever imposed on employment relations subjects labour to the determination of property, with the eventual result of suppressing its social character and consequently silencing its demands as a social creative force.

As we have demonstrated in chapter one through the legal device of contract the labour of the employee is assimilated to that of the employer. We have seen there that although in the final instance labour provides the legitimating principle for the institutional arrangement of capitalist society its claim is exhausted in the performance of the contract. Consequently, its creative force is appropriated and assimilated by property and as such is determined by its interests and its logic. According to this view as was expressed by Locke, rights are natural and as such pre-exist any institutional arrangement and in no way derive their validity from its approval. The latter comes to existence in order to protect the already existing rights, not to create them. Therefore in it labour has only the rights that appertain to the person of the labourer according to the principle of self-ownership. If according to this principle the labourer has freely entered by his/her own free will to a contract for the provision of his/her services then the only s/he deserves is what s/he has freely contracted for. This means that labour in post social contract society can claim no right by virtue of its creativity or of its social significance, since the right of labour has already been recognised in the principle of self-ownership and rewarded through the performance of the contract.

Libertarians would attempt to circumvent this contradiction by deploying the argument of property as justified through the notion of self-ownership. A libertarian would argue that the propertyless in a market society nonetheless have the opportunity to enhance their position and acquire property upon things through their participation in the market, through the exercise of their skills and abilities, in other words through their labour (which of course according to the principle of self-ownership is their property). Here we encounter again the abstract character of libertarian social theory. The libertarians present us with a society were what legally exists *in abstracto* also substantively exists *in concreto*. Libertarians consider that since there are no legal restrictions for the participation in the market there are no social ones either. Libertarians consider that anyone can participate in the market game without taking into account the constraints that are imposed on individuals by the inequalities that are produced through the modern class system. In other words they presume that the conditions of entry in the market are the same for everyone. However, social and class origins determine the availability of resources and knowledge and as such as play a vital role in the opportunities that each individual has in participating in the market game⁴⁰. As libertarians would have it the child of a factory worker and the child of the factory owner can go to work in the same factory under the same conditions. It is in this sense that we can see libertarianism as based on ideological abstractions that ignore social positions as a factor for the determination of social conditions. Libertarianism in other words projects a rationally constructed social model whilst at the same time ignores the realities that this model is supposed to accommodate. Social needs are conflated with market needs.

At another level we can see how the ideological justification of property through labour dictates a certain understanding of labour. We have seen in chapter one that labour in capitalism is determined in its substance by property. Under its consequent market perception labour becomes nothing but a quantifiable object of exchange. We do not mean by this that capitalism nullifies the creative power of labour. On the contrary, as we have seen it totally depends upon it. The crucial point here is again the power of determination of the creativity of labour. The point is that in capitalism this power rests with property. This means that labour should be creative, but not for its own sake, not for its own immediate interest, but rather for property's goals and

⁴⁰ For the structure of the reproduction of class differences see Bourdieu (1984).

purposes. In capitalism property holds the prerogative to determine when labour is to be creative and when mundane and meaningless; and this according to its own needs. As a result neither society nor labour itself *can be the measure of its own creativity*. On the contrary this creativity is determined by the capitalist economic system through the market exchange process.

This analysis leads us to the point where the usefulness of labour is not understood as social usefulness, as the satisfaction of needs and desires not even as a contribution to a way of life but in its value as an exchangeable product. The point is that as an object of exchange labour becomes an object that has to be determined as to its value as everything else that circulates in the free market.

What is of interest to us here is to see source of the determination of this value. As we have seen labour for the labourer in capitalism like every other commodity is realised as exchange value⁴¹. What does this practically mean: As Locke himself has said value has nothing to do with '*the intrinsic natural worth of anything*'⁴². And as Arendt has succinctly remarked, something becomes a value from the moment that it appears in public and somebody recognises it as such. No object has an absolute value attached a priori to it. According to Arendt the value of any object '*...consists solely in the esteem of the public realm where the things appear as commodities and it is neither labor, nor work, nor capital nor profit, nor material which bestows such value upon an object, but only and exclusively the public realm where it appears to be esteemed, demanded, or neglected*'⁴³. And Marx himself has said that things or ideas or moral ideals '*become values only in their social relationship*'⁴⁴. In a similar vein Simmel argued that value is a relative concept that is realised and objectified through an act of exchange between two individuals that mutually satisfy their desires. The factor of mutuality as it appears in the act of exchange is what creates and sustains value⁴⁵. And as we have said in the previous chapter the quest for an objective value of labour regardless of the valuation of others is a futile undertaking⁴⁶. This means that the value of labour as any other value is determined by the subjective needs and desires of others. Does this mean that we accept here the free market treatment of

⁴¹ Marx (1973) p. 305-306. See also chapter one section 5.

⁴² Locke 'Considerations upon the Lowering of Interest and Raising the Value of Money, Collected Works (1801), II, p.21 cited in H. Arendt (1958) p164.

⁴³ H. Arendt *ibid.* p.164.

⁴⁴ Marx, Capital Vol. 3 p.689 cited in Arendt *op. cit.* p.165

⁴⁵ See Simmel (1978) pp. 59-101.

⁴⁶ See chapter one section 5 on Marx.

labour as a position that is universal and of the free market from thinkers that were not liberals? The answer to the question depends on whether Arendt's public realm, Marx's notion of value as a social relation and Simmel's notion of the relational objectification of value through mutuality can be accommodated with the liberal notion of the free exchange market. The answer is that it obviously cannot. Neither of them denied the unquestionable superiority of the market economy, a superiority that has been proved by the unprecedented success of capitalist economy. Our objection here has to do with the particularity of labour and whether it can be submitted to the process of free market exchange and not with the exchange mechanism itself.

In other words our problem does not lie with the process of exchange as such, which undeniably is one of the basic forms of social interaction, but rather with the liberal and neo-liberal understanding of labour. The problem lies in the subsumption of labour under the logic of the process of the exchange of *commodities* that have been deprived of all their substantial properties⁴⁷.

The difference between the public realm that Arendt described and the libertarian free market, is that the market is not the open forum for the exchange of opinions, ideas and objects as they stem from human praxis but rather a space for the exchange of self-determined and self-legitimizing property rights. Unlike the market the public realm is not determined by the logic of property. Moreover, value may be a social relation as Marx has asserted but the problem is who determines the terms of this relation. Labour in capitalism -and here we find the problems that Hegel discovered in the exchange of labour- does not exchange its products and thus create the parameters of the determination of value as stemming from a relation of mutual satisfaction of desires, but on the contrary it is exchanged itself as an impersonal commodity. The problem here rests on the fact that whereas labour becomes productive in and through the relation of exchange of its product, in the capitalist market it erases itself through the act of its exchange as a being a product itself. The crucial fact rests on the fact that the exchange of labour qua product itself is not a relation where the self exchanges but rather where the self is exchanged. The problem is that in the capitalist labour market what is exchanged evades the logic of the market. Human creativity not only as stemming from labour but also from e.g. art cannot be exclusively assessed in economic terms. Our objection here has not so much to do with the determination of

⁴⁷ See the classical analysis by Marx on commodity fetishism (1976) pp. 160-177

the value of labour but rather with the source and the logic of the determination of labour per se as exclusively economic in the capitalist sense.

Relative to this is the libertarian understanding of the compensation, the value of labour i.e. the wage. Libertarians advocate that the wage as the price of every other commodity should be determined by the market and only by the market⁴⁸. The position that perhaps best encapsulates the economically determined libertarian understanding of labour is the assertion by Hayek that the wage is nothing but an indication to the worker as to which sector of the market s/he should orient his/her activity⁴⁹. This assertion has major normative implications. First of all it divests labour from all claims that can be justified on the basis of it being a creative action with a positive contribution to society. The wage is not a fair compensation for a performed act, for a creative effort. The wage is an indication that refers to the fluctuations of the market not to the labour process. This means that the wage no longer refers to the act of labour but to the self-referential norms of the labour market that, according to the libertarianism are by default are just. Consequently, the notion of the wage as the just compensation of labour loses its reference to a notion of social justice, a notion that libertarianism abolishes as meaningless⁵⁰ and becomes totally market determined. The character of labour as social action becomes silenced and as a result the rights that it may claim in virtue of this social dimension become totally delegitimated. As a result, for libertarians there can be no right to a fair wage, a fairness that is understood on the basis of what society may consider as just, since social justice is concept devoid of meaning, as not market determined. As market determined labour has only the rights explicitly stipulated in the labour contract, i.e. in the legal form that regulates the act of exchange of labour as a commodity.

The market perception of labour is tied to the market perception of employment. If labour is collapsed into the exchange of a commodity then the labourer is but a property right holder that exchanges it in the free market. Employment becomes a relation between two property rights holders. The employee who has a right of property over his/her labour power and the employer who has a right over the means of production and who needs the labour power of the worker in order to put them in

⁴⁸ According to Hayek as it stands for the price of every other commodity, every market determination of a wage should be deemed as valid in the absence of violence, fraud and deception Hayek (1982) Vol.2 p.141. See also Hayek (1960) p.282 and (1982) Vol. 2 p.75.

⁴⁹ Hayek (1980) pp.28-29 and Hayek (1982) Vol.3 p.144.

⁵⁰ See Hayek (1982) vol. 2, chapter 9.

action. The complexity of employment is collapsed into a straightforward case of market exchange. It is under this prism that we can understand the role of the free labour market in capitalism. Labour is the precondition for the production of commodities and the labour market provides this production with a constant supply of labour to be used according to the needs and the rationality of capitalist production. In this respect the labour market in the last instance is nothing but the device through which the market could apply market criteria to labour.

Having explored the commodification of labour as marketable commodity we will now turn to law, to see how this domestication is effected legally and legitimated through law's devices. Libertarian legal theory aims at justifying the basic premises of the libertarian approach, which perceives the value of individual freedom as supreme and as the source of its commitment to the legal institution of the rule of law.

3. *Libertarians, Labour and Law*

3.1 *Libertarians and the rule of law*

The main libertarian position is that any legal rule should be something impersonal and rational that should not command action but rather determine the limits within which action can take place freely. This means that no legal rule should be crested by any particular will, for the fear of being coercive. As a result the rule has to be impersonal and rational. The rationality of the law lies in the fact that it should follow and accommodate rational human action. However since according to libertarians reason is what has created and sustained the market structure the law should adapt itself to its unyielding realities. As Hobbes has put it long before libertarianism, just is what is not opposed to reason⁵¹. This has as a result that the normative structure of human symbiosis is rationally given through the natural orientation of action in the market, with the law having the task to formalise this structure and protect it with the power of sanctions that it possesses. If we follow the libertarian logic then the system of the rule of law becomes the perfect legal counterpart of the market order. Just as the market, it was invented by no one but emerged through an evolutionary process⁵². Thus the rule of law is in correspondence

⁵¹ See Macpherson (1962) p.75

⁵² Gamble (1996) p.98

with the ideal of critical or evolutionary rationalism in opposition to substantive law that appears to be the equivalent of constructive rationalism. In other words the rule of law guarantees the correspondence of law to the structure of interaction in the market. According to libertarians only the rule of law can guarantee human freedom, since only the rule of law guarantees the function of the market mechanism that as we have seen according to libertarians unlike the human will is not coercive⁵³. We see once more the unwarranted libertarian derivation of the 'ought' from the 'is'. Norms cannot be negotiated on the basis of the interaction of social interests and discourses. They are rather given through the 'impersonal' market order. If a norm, even if it is socially accepted as valid, runs contrary to the rationality of the market order has to be abolished as either unnatural or coercive or both.

It is worth mentioning two things here: The first concerns the notion of formal legal equality that the rule of law established. The rule of law presumes all individuals as equals before the law. This principle –apart from being one of the cornerstones of our legal culture- expresses as well one of the basic moral foundations of the free exchange market. We have seen that the main moral argument in favour of the market was that any person is free to participate on an equal footing regardless of available resources or power as everybody else in the market game, the rules of the game being the same for everyone. The principle of legal equality in this respect can be seen as the legal aspect of the argument. The rule of law in other words comes and guarantees with the force of the law of the state the moral framework of the market order.

The second point has to do with the legal understanding of the individual in its moral relation to its social world and the consequences that this approach has for the legal understanding of the collectivity in general and of collective rights in particular. Liberalism advocates, as we have seen, a concept of individuality as socially unembedded (given how fundamental labour is to the constitution of the social self.)⁵⁴. This in combination to the individualistic approach of the person as rational market actor shapes the libertarian view on social and moral responsibility. It is the primacy of the individual over the collectivity that narrows down the ambit of responsibility of the actor first of all in the observance of the rules of the market game and secondly to the duty of care that one has (only) to one's loved ones, since it is

⁵³ On Hayek's views on the rule of law see in particular J. Gray, *Hayek on Liberty* (1986) pp. 61-71

⁵⁴ See MacIntyre (1981) chapter 9, Taylor (1979) pp.157-159, Sandel (1982) pp.94-100.

only they that are dependant on his/her action⁵⁵. In the first case they are motivated by utilitarian and in the second by affective considerations.

I will here rehearse a largely familiar critique of liberalism and neo-liberalism that nonetheless will be proved extremely useful in the next two chapters when we will deal with the legal understanding of labour as collective action. It is exactly this primacy of the individual over the collective body that determines the limits of his/her social responsibility. Since the individual pre-exists and creates society for the protection of his/her self-interests s/he cannot be bound by it in a course of action that would contradict and negate those self same self-interests. It is this primacy of the individual in the libertarian schema that prohibits the collective body to impose duties upon the former. In other words no collectivity can impose to the individual a positive duty in the sense of an obligation to proceed to a certain course of action since the power of the state over the individual can be extended only to the degree that the individual has agreed to hand over to it. The primacy of the individual that is derived as a fact of reason has as a consequence that the moral responsibility of the former should not have a substantive content that would command the observance of specific duties. The imposition of such an obligation would directly violate the market order, on the basis of substantive beliefs of a collective body that has rights upon the individual, rights that extend beyond the observance of the rules of the market game. Therefore any such imposition would be arbitrary and coercive. According to libertarians individuals and only individuals have rights and these rights are negative rights or immunities that protect their private sphere from infringements⁵⁶. Moreover, the individual cannot possibly have an abstract duty of care towards the other that is imposed on the basis of coexistence within the same moral, social and finally institutional framework nor on the basis of social solidarity. For example, according to Hayek the notion of solidarity is irreconcilable with the market⁵⁷. This is so since the individual as the absolute moral unit has absolute responsibility for him/herself and cannot be coerced into serving ends that are not his/hers⁵⁸. Here we discover another dimension of the principle of self-ownership a notion that is central for the whole construction of the libertarian view. Since the individual owns itself, s/he has responsibility only for itself. S/he can neither accept nor request responsibility for its

⁵⁵ See this chapter, footnote 35.

⁵⁶ Hayek (1982) Vol. 2 p. 101.

⁵⁷ Ibid. p.111.

⁵⁸ Ibid. p. 149

own person from someone else since that would result in its determination by another will i.e. to the negation of his/her freedom. There is an important clarification that should be made here. Libertarians do not oppose the provision of help to those who are socially weaker. On the contrary both traditional and neo-liberalism have traditionally relied on charity in order to relieve the burden from those who have fallen victims of the unpredictability of the fluctuations of the market. What they have vehemently resisted is the obligation to do so. For them help was a religious duty that could never be translated into a legally enforceable legal obligation as such a thing would remove any moral merit from the act of assisting the needy other!⁵⁹

As a result the only obligation the individual has towards the other lies in the observance of the rules of the market game and nothing else. This means that the individual has to abstain from the use of violence and fraud since through them not only would the freedom of the other person is violated, but moreover the function of the market is contaminated. In conclusion we could say that libertarianism finds in the principles of the rule of law a legal point of view that is in accordance with the ideal of the market society. This is not to deny the value of the rule of law. Our objection that is going to be articulated more clearly as we proceed with our analysis is whether the rule of law as a legal approach can be adequate in itself in providing legal solutions to problems as they stem from the multifariousness of the employment relation, a multifariousness that is ignored by the rationality of the free market. Our claim is that it cannot. And it is this that we are going to try and prove next.

3.2. Employment and the shift from status to contract.

We have seen that for libertarianism employment is like any other market relation. In our analysis above we saw that the rule of law provides the basic presuppositions for this exchange to take place in a catallactic society. In this respect contract and especially the doctrine of the freedom of contract should be seen as linked to the market and to a market based society⁶⁰. Contract provides the cornerstone for the legal regulation of exchange. This means that contractually based understanding of employment will eventually subsume it under the rationality of the market.

⁵⁹ See F. Ewald (2000) pp. 131-134.

⁶⁰ See A. Kronman and R. Posner (1979) p.2-3

However as the doctrine of freedom of contract is fundamental for libertarian legal theory and as it has been extremely influential in the formation of the system of employment relations in modernity an analysis in reference to the historical-sociological parameters that led to its prevalence would be very helpful at this point, as it will demonstrate the ideological foundations upon which the normative idea of employment as a form of legally protected market relation is built.

As we are going to see contract did not always have the form that it has today. It was not always a legal instrument for the creation of voluntary obligations based on the free will of the rational individual actor who pursued his/her self interest. On the contrary as we are going to see the notion of purposive, task oriented contract is historically connected to forms of capitalist exchange. As Weber demonstrated legal obligations in medieval, pre-capitalist societies were created on the basis of the principle of social status and involved the whole sphere of the social relations of the individual. The individual was legally determined by his/her status in the sense that the legal rights and obligations but also her/his social situation in general were prescribed to her/him in virtue of the social stratum that s/he belonged. His/her social condition was not the outcome of her/his free action as a citizen that determined through his/her social action his/her social situation. In the cases where legal relations were voluntarily created and shaped according to free will, the legal relation that was created was very different in essence to what we understand today as voluntarily created obligation. The obligations and the subsequent rights that would arise might have been voluntarily incurred but nonetheless involved a total change in the legal and social situation of the individual. The non-capitalist notion of contract was distinctly different to our understanding of it. The medieval contract was a kind of 'contract' where a person assumed the obligation to be someone's friend, comrade, wife, vassal etc. In Weber's words: *'the contract rather meant that the person would become something different in quality (or status) from the quality he possessed before'*⁶¹. Contract was determined by affective considerations, as they were perceived by a system of traditional social relations. The ideological function of contract was to endow coercive power relations as they stemmed from the rigid social stratification of a traditional, and immutable according to its self-perception - society, with the legitimating excuse of the voluntary acceptance of the given order of things

⁶¹ Weber (1978) p. 672.

by all the parties involved. In other words contract involved either the endowment of a privilege or/and the acknowledgement of a social dependency that derived its eventual legitimation from the fact that it was voluntarily concluded⁶². In other words its function was originally social and not commercial. It was not market but rather social considerations that determined it as an instrument for the voluntary creation of legal obligations.

From an historical point of view, we can say that the emergence of the market-oriented economy was the main factor that gave major significance to contract. According to Weber contract started to acquire importance when the economic unit of 'household' started losing its autarchy and increasingly had to barter with other economic units i.e. other households outside of it; an instance that was critical for the creation of the free exchange market⁶³.

Contract in the free exchange market becomes an instrument that gives legal meaning to a rational exchange relation of economic nature. It imposes a legal obligation that it is voluntarily assumed, limited in its scope and purposive-rational in its character. It should be stressed here that purposive, task oriented contracts existed where we had the presence of capitalist commercial activity such as ancient Athens, or in the merchant cities of Medieval Europe such as Amsterdam or Antwerp. Largely, in these cases contracts involved the regulation of specific economic relations that mainly had to do with maritime commerce that it was operating on a capitalist basis. This means that purposive contract pre-existed capitalist societies; it was however inexorably linked to capitalist forms of economic activity, since it could perfectly grasp and regulate the formal and purposive character of capitalist commodity exchange⁶⁴. The huge qualitative difference is that with the advent of

⁶² It is interesting to be noted at this point that in the Feudal times hierarchical relations of dependency such as lord and vassal or baron and kind were ceremonially sealed through the voluntary acceptance by the weakest party of the legitimate power over him of the hierarchically higher. The point is that even then an act of consent as it stemmed from the free will of the individual was essential for the assumption for the creation of any legal obligation. See Bloch (1989) Book two.

⁶³ Weber (1978) pp. 668-681.

⁶⁴ For example in ancient Athens we have complete freedom of contract, especially after the second half of the 5th century B.C. The difference however, lies in the fact that in the Athenian polis freedom of contract was not the organisational principle of the constitution of the city state or of the form of government. It was rather its indirect result. It mainly had to do with the separation between the public and the private sphere; between public virtue and private interest. The Athenian democracy may have created the concept of the free citizen but has produced very little in terms of commercial law. This was largely left to the discretion and the autonomy of the free citizens through contract. Moreover, contract had nothing to do with the political organisation of the city state. The notion of social contract is inconceivable in ancient Greece. The point to be made here is that we have the emergence of legal forms that regulate forms of capitalist economic relations in societies that cannot be characterised as

capitalism purposive contract surpasses its peripheral character as a legal instrument for the regulation of market relations that largely have to do with banking and maritime commerce and becomes a fundamental principle of social organisation.

First of all with the advent of the free purposive contract we have a major change in what concerns the source of legal obligation, a change that in its turn meant a profound transformation on the understanding of the individual in its relation to the normative order of society. It is no longer traditional norms that create legal obligations and rights, but rather the individual will. Purposive contracts impose obligations that have been voluntarily created and assumed. This means that the individual is not entangled by virtue of his/her status in a normative web that authoritatively regulates his/her position in life. On the contrary s/he creates it. The notion of individual autonomy is now a value of paramount importance. The individual can perceive him/herself as a free social and rational actor who is able and capable to pursue her/his self-interest. We can see now the ideological affinity of modern contract to both classical and neo-liberalism. It is the notion of individual autonomy, the right of the person to freely pursue its self-interest that underpins both theories. Unlike traditional societies where the obligation was due to a web of personal or family dependencies now the obligation is inexorably tied to the right of an individual to bind him/herself in a certain course of action through an act of his/her free will; a will that is expressed in a legally binding promise to do so⁶⁵.

In what concerns us here we have a profound transformation of the labour relation in both its social and its legal perception. The vocational structure that hitherto was regulated by status is now regulated by contract. The individual worker no longer has the obligation to follow a vocational path that has been prescribed to him by status relations (i.e. the son of the craftsman that has a duty to continue the household enterprise) but on the contrary he can choose it by participating in the free labour market that is created as an essential prerequisite for the predominance of the capitalist system⁶⁶. As a result, the source of regulation of the labour relation per se is

capitalist. As such and although we do have freedom of contract and purposive contracts in many capitalist or quasi capitalist economies we do not have them as organisational principles of society and government until the advent of capitalism. As Marx has said is that although we do have many forms of capitalist accumulation in history we do not have capitalism until these forms become socially predominant Marx (1976) pp 1021-1023. Moreover another difference lies in the fact that if we accept freedom of contract as an organisational principle of society we accept the primacy of the economic orientation of action, a primacy that the Athenian polis could not accept.

⁶⁵ See Atiyah (1979) pp. 139-193 and pp. 398-454. See also Fried (1981).

⁶⁶ See Weber on the preconditions for the emergence of capitalism. Weber (1999) pp. 43-45.

changed. It is not the rules of the guild that regulated the relationship between the craftsman and the worker; on the contrary in capitalism the rules of employment, in theory at least, are mutually created by both, through the conclusion of the contract of employment. In theory at least the worker can become anything s/he pleases and anything that his/her abilities allow him/her to be⁶⁷.

On the sociological level this change is parallel to the profound transformation of the workplace a transformation that was the outcome of the emergence of the capitalist mode of production. The workshop with its personalised labour relations was substituted by the impersonal capitalist work organisation. In this sense the labour contract prevailed due to the fact that it was the ideal legal instrument to regulate the relations that the factory system created. Employment in the factory or in the bank was a relation of mutual personal disinterest that was voluntarily concluded on the basis of the operation of the free labour market. It was a relation that begun and ended at the factory gate. Since in appearance at least no obligation was imposed on the person of the free labourer apart from the one that s/he has assumed in the contract his/her personal autonomy theoretically was not violated. Additionally, contract with the notion of legal parity between the parties imported into the relation the principle of formal legal equality. The authoritarian character of the capitalist work organisation was concealed through the pretext of equality that contract provided⁶⁸. As we have seen in the previous chapter and as we are also going to see in the final chapter as well, the contractual employment relation especially as it is implemented in the capitalist work organisation is one that is based on the permanent authority and domination of the one party (employer) over the other (employee). In this respect we can see the doctrine of freedom of contract as an ideological justification that through the legal principles of individual autonomy and contractual parity attempts to obscure the authoritarian elements in the employment relations of capitalism.

We have so far seen the market derivation of the notion of freedom of contract as it was applied in labour relations. In the next section of this chapter first of all we are going to examine the interrelation between freedom of contract and libertarianism.

⁶⁷ However as Marx has shown this meant nothing else than the substitution of traditional forms of dependence by objective ones that were reproduced through the social class system. Dependency in other words rather interpersonal and subjective becomes social and objective. Marx (1973) pp. 163-165.

⁶⁸ Marx (1976) pp. 549-550. See more on the issue on chapter four section 3.1

We have briefly traced how, historically, the doctrine of freedom of contract eventually becomes the legal translation of the imperatives of an economic system that is based on the notion of the free market. This will allow us to understand the rationality of the subsumption of employment relation under the freedom of contract model, and see whether as libertarians suggests such a solution is going to enhance the individual autonomy of the parties involved in it.

3.3. Liberalism and the contractual perception of labour

We have seen that through the advent of capitalism contract has become the legal instrument for the regulation of exchange in the free market. The basic principles of the contractual doctrine especially in its original liberal period have been focused on this function. We can say that the theory of contractual freedom represented the then emerging liberal doctrine in the field of legal practice⁶⁹. This is so since the contractual doctrine especially in the years that contract attained prominence was deeply influenced by the principles that the theories that the liberal political economist of the time provided⁷⁰. First of all they both shared the same ideal of social relations. They both projected the ideal of a society based on the rational action of equal in front of law individuals that are free to pursue their self-interest, in the free market. Contract is what makes the process of free exchange possible by legally spelling out agreements and consequently making them enforceable through the state legal system. Contractual principles are thus aligned to the basic presuppositions of the early political economy. They share the assumption that exchange is the basic form of social action and that the social structure is developed and sustained through the legal-contractual regulation of exchange. The role of contract for the early political economy and liberalism is therefore paramount. Contract as a principle is not only confined to the legal regulation of economic exchange, it has a wider role according to the liberal social understanding: Contract encapsulates as an ideology and as a practice the liberal ideal of a society that comes to life through acts of the free will of its members that mutually bind themselves in certain courses of action. According to

⁶⁹ See Atiyah (1979) pp. 292-304

⁷⁰ Atiyah (1979) pp. 292-323.

the contractualism, citizens through contract form their legal relations by an act of their free will, thus freely forming the rules of their social symbiosis⁷¹.

The notion of competition as the essential characteristic of the market is incorporated into the contractual doctrine, as the latter emerges as a form for the regulation of competitive market relations. In this respect another dimension of contract, its substantive neutrality, becomes important. The liberal notion that just procedures produce just results finds its application here⁷². The doctrine of freedom of contract thus becomes an ideal measure of distributive justice.

*'Justice consisted in ensuring the rules of fair play, setting the framework within which competition was to take place, and then enforcing the results... Basically those who succeeded owed their success (it was thought) to their own virtues, while those who failed had only themselves to blame.'*⁷³

We see in this the close connection of the liberal doctrine of contractual freedom to early liberalism and modern libertarianism. P. Atiyah's account of the understanding of the notion of justice of the English courts at the height of the prevalence of the doctrine of the freedom of contract would translate smoothly into an account of the normative positions not only of Locke or Hobbes but even the more so of modern libertarians such as Hayek, Nozick or Epstein.

This brings us back to Hayek's argument that the success of a rule does not depend upon the quality of its results in some particular cases. The rules are there to protect the integrity of the game, not of the participants. If the rules of the game have not been violated then the legal system should not have a problem with it. This notion of justice upheld is absolutely in accordance with the libertarian doctrine.

This of course does not mean that contract is just a one-dimensional economic device for the solution of problems and conflicts as they arise in and for the economic system. On the contrary as we are going to see in chapter four it has evolved into a sophisticated multi-dimensional legal instrument that is formed in its content by the interaction of many discourses. Moreover the extensive regulation of contract has severely curbed the application of the doctrine of freedom of contract⁷⁴. However, and despite the fact that these relations as we are going to see involve non-economic considerations contract has application when an economic goal is at stake. This is so

⁷¹ See among others especially Rawls (1971), Scanlon (1998)

⁷² See Nozick (1974) 215. For a critique see Sandel (1982) p. 112.

⁷³ Atiyah (1979) p. 288

⁷⁴ See especially Wilhelmsson (ed.) (1993) and Collins (1999)

since contract by its nature regulates market exchanges that by definition are of economic significance. The application of contract presupposes a relation that can be expressed in economic terms, that has an economic meaning even when this relation is not solely and sometimes even not primarily economic. However, in this case the originally non-economic stake is translated into the economic discursive genre, and is regulated by the latter as an economic stake⁷⁵. This means that when subsumed under the contractual form social relations are through the legal discourse translated as if being primarily of economic nature. The social interest that is expressed in the contract becomes an economic demand that can be legally enforced⁷⁶.

In this respect Pashukanis was right in saying that the legal form of contract was the essential expression of the capitalist legal form. In it the exchange relation finds its expression in what he termed the legal form as a legal relation⁷⁷. In this respect contract is but the transposition of the economic practice of free commodity exchange with all its implications (epistemological assumptions, social theory and anthropological perceptions) into the legal system. Under this perspective not only we have the regulation of an economic practice but also the adoption of an ideology that now has been translated in legal terms. Libertarianism as an ideology becomes state law.

4. Libertarians on Labour Law

We have seen so far how through contract social relations acquire through their legal translation a primary economic determination. What we are going to see next is how employment through the same rationality is divested from its social character and is reduced to a private economic concern. The libertarian approach is characterised by the denial of the complexity and the political and social dimension of employment. On the contrary it recognises only its economic dimension that in its turn it is

⁷⁵ Classical example of this are prenuptial agreements.

⁷⁶ For example for Luhmann contract is the legal instrument through which the close structural coupling between the economy and private law is made possible Luhmann (1993) *Das Recht der Gesellschaft* p 459 ff. cited in Teubner (2000) p. 411.

⁷⁷ Pashukanis (1978) p.121. Although I cannot agree with Pashukanis when he says that outside contract the legal concepts of the subject and of the free will are lifeless abstractions, since historically we encounter the existence of the concept of subject even in different guises in social and legal cultures that were not based on free market exchange. Nonetheless, I do accept that in capitalism the legal understanding of these two concepts cannot be separated from the notion of free market exchange and therefore from the notion of freedom of contract.

subsumed under the logic of the free exchange market. As a consequence the denial of the social dimension of employment finds its expression in an attack against any understanding of employment that is not market oriented. The collapse of society into the market economy allows libertarians to advocate the abolition of all legal measures that have been adopted in order to mitigate what we perceive as the structural inequality of the employment relation.

Perhaps the most comprehensive work that provides us with a clear understanding of the libertarian positions of labour law in late modernity is R. Epstein's '*A Common Law For Labour Relations*'⁷⁸. In this article Epstein has set the basic principles upon which the modern libertarian understanding of labour law should be based.

This article can be considered as seminal because it has heralded the attack against the employee protection legislation in the USA as it was introduced mainly by the policies of the 'New Deal'. Epstein advocates the abolition of the welfare state policies, in favour of a contractually determined, private law approach.

He argues that '*the defence of the common law system is not an assertion that the market can handle every social problem but that the law of property and the law of torts are the basis upon which a framework of original rights can be built*'⁷⁹.

He continues: '*Every person owns his own person and can possess, use and dispose of its labor on whatever terms he sees fit*'⁸⁰. *To state otherwise is to say either the labor cannot be used or that someone can direct its use*'.

Locke himself could have written this passage; the position of self-ownership as applied in employment relations cannot find a better justification. The self owns his/herself and therefore it can dispose his/her property, i.e. his/her labour as s/he sees fit. Employment is a relation that stems from individual autonomy⁸¹. As a result we have a straightforward opposition to any principle of substantive law. The law cannot supplant the choice of the individual regardless of the motives and conditions that affect his/her decisions. As we have seen for libertarians social conditions that

⁷⁸ Epstein (1983) p. 1357. For an overview of the libertarian position on labour law see Epstein and Paul (1985).

⁷⁹ Epstein (1983) p. 1364. Of course no one (not even Hayek if that says anything) has ever suggested that the market can provide solutions to every social problem. Nonetheless, in a catallactic society the market although it is not a panacea it is the source that provides the rule of decision in situations concerning the satisfaction of social needs and desires.

⁸⁰ Ibid. Epstein citing W. Erle "The Law Relating to Trade Unions" 1869

⁸¹ It is indicative that Epstein considers employment as a private relation of exchange between individuals that form this relation in any way that they see fit. Epstein *ibid.* 1366.

determine the state of labour are considered as irrelevant. The inequality of bargaining positions, need and deprivation are not considered by libertarians as forceful conditions that might curb the principle of free choice.

To give an example: for Epstein the minimum wage requirement is coercive since it prohibits a worker from finding employment by offering his labour at a lower price than the customary one⁸². This is so since through minimum wage the state supplements the worker in his/her choice of the disposition of his/her labour as s/he sees fit. The fact that this choice may be conditioned by the social context under which the offer for the disposition of labour is given (namely coercion under the pressure of need), or by the collective interest of employees to the preservation of a high customary standard, here becomes irrelevant as they are not recognised as valid factors of determination of the content of the employment relation. We see here again the libertarian perception of the employee as an individual market player that without being constrained by social bonds and dependencies egotistically pursues his/her self-interest (the only valid form of interest) in the free labour market. Moreover the fact that the one who benefits from such an exercise of choice is the employer who, unconstrained by legal rules, can impose terms and conditions of employment as s/he sees fit is completely ignored by Epstein.

As for the contract of 'employment at will' that is projected as a credible legal solution only a brief comment will be made here. The idea of employment at will should be seen as an extreme version of the doctrine of freedom of contract as applied in employment relations. The advocates of employment at will basically ask for the possibility of the conclusion of the contract of employment according only to the free will of the parties. Additionally the termination of employment can be unilaterally decided by either of them without any restrictions as imposed by unfair dismissal regulations. The argument again is based on contract law principles. The idea that underpins the justification of employment at will is again that of private autonomy through the free disposition of labour. We have seen that this is the principle that libertarians want to govern employment relations. Therefore employment at will as a direct expression of private autonomy should be the guiding principle regulating employment relations since as Epstein claims private autonomy may accept

⁸² Ibid.

limitations but cannot be excluded from whole social areas⁸³. But is autonomy really enhanced by the 'contract at will'? As we have repeatedly said employment is a par excellence a heteronomous power relation. In this respect enhancement of autonomy would mean the reduction of heteronomy, the balancing of the position of the position of the parties. But does employment at will contributes to this?

If one wants to perceive autonomy as the capacity of self-determined action, then only the limitation of the power of the employer and its compliance to a socially accepted - both in terms of fairness and economic expediency - perception of what is a valid reason for dismissal can enhance autonomy. This is so because the sense of security provided by a minimum floor of rights can protect the employee from arbitrary or coercive behaviour⁸⁴ on the part of the employer since the latter is in a position of superior power. The contention that employers will be careful not to dismiss workers capriciously because this will damage their reputation and subsequently make it difficult for them to recruit personnel⁸⁵, presupposes an extreme transparency in the job market that simply does not exist, and is anyway of instrumental rather than intrinsic significance. Additionally, in a period of continuous high unemployment the bad reputation of an employer would be a very small hindrance to people asking to work for him/her. The argument that the employee has the right to quit as well whenever she/he wants seems to forget that the cost for the employee losing his job is far greater than for the employer losing a good employee (even in the case where he has invested on him/her a high level of training)⁸⁶.

The argument that the contract at will, will increase productivity, will improve the monitoring of the performance of workers and that it will allow the management to employ carrot and stick tactics more successfully⁸⁷ (leaving the issue of productivity outside since this as a valid argument that nonetheless cannot be

⁸³ Epstein (1984) p.954.

⁸⁴ Even the liberal notion of coercion would apply here since it implies action dictated by another and serves the other's ends. On that see Hayek (1960) p. 137. I don't think that the unilateral imposition of working conditions by the employer under the constant threat of dismissal could be interpreted differently.

⁸⁵ Epstein (1984) p. 967.

⁸⁶ Besides that, in most labour law systems the employee does not have to compensate the employer when for whatever reason he/she leaves his/her job. The obligation to give notice prior quitting cannot be considered as a considerable constraint. An application of the compensation of inequality principle that alters contract law solutions.

⁸⁷ Epstein (1984) pp. 963- 965.

uncritically accepted⁸⁸) maybe valid as a statement of fact but it suggests a relation between management and labour that has nothing to do with the autonomy it allegedly comes to restore. It reveals the oppressive side of the libertarian argument as a blatant support of property in its opposition to labour. These arguments in the name of private autonomy completely abolish it for workers in support of employers as if the latter represented a general social interest that the law should protect. What is frightening is that these voices not only advocate the de-legitimation of employee interests as valueless, but moreover suggest a new form of social exclusion. In the recent past it was unemployment and moreover the inability to enter the labour market that created marginalised social groups. In the case that the doctrine of the employment at will prevails, we will have the social exclusion of persons or groups that can be marginalised despite their participation in the labour market. This is so since employment at will forces a part of the workforce –its most low skilled and therefore vulnerable part- to work with absolutely no rights. In the recent past the importance of a job rested not only in the fact that it provided the worker with the means of his/her subsistence but moreover with a feeling of security that stemmed from the awareness of the fact that s/he had rights. Moreover this feeling was translated into a notion of being an active and participating citizen with rights and obligations towards his/her employer. On the contrary the employment at will theory creates a workforce –or rather a significant part of it- that cannot derive a feeling of security from its job. Moreover it creates groups that as amenable to manipulation will not claim their rights with the fear that they might lose their means of subsistence. Therefore in this case we have a part of the workforce that practically will not be covered by a net of social protection, but will constantly try to sustain itself in all kinds of jobs regardless of working conditions and remuneration. This means that a part of the workforce will enjoy a significantly lower standard of living not only in terms of material subsistence but also in terms of rights, security and ability to plan a successful life strategy.

The argument that ‘employment at will’ will enhance the flexibility of the labour market and will make it more accessible to disadvantaged social groups may have some validity. However, employment at will creates a form of downward socialism in the sense that it pushes social groups that until now enjoyed an acceptable standard of

⁸⁸ However, it is highly contested that policies of flexibility will be economically beneficial in the long run. For an overview of the economic case against the deregulation of labour standards see Deakin and Wilkinson (1994)

living to accept a significantly lower one. As for the argument of the accessibility of the labour market to disadvantaged and excluded social or ethnic groups⁸⁹, one of the things that one could argue is that the creation of a low skilled overexploited labour force with very limited bargaining power is a very bad 'remedy' against racism and social exclusion. The question that therefore emerges is what kind of flexibility we need in the labour market. If it is combined with the abolition of rights, the severe constant insecurity it instils in the workforce, the aggravation of the gap of power between property and labour and the intensification of heteronomy in industrial relations then the price is too high to pay.

Moreover, the defence of the idea of 'employment at will' should not be deemed as some libertarian extravagance. Its justification is central to the idea of employment as a private economic relation. It is characteristic that libertarians in comparing employment to private life situations construct their argument on the basis of the principle of the arbitrariness of human preferences that cannot provide the basis for the creation of legal expectations. Nozick for example uses cases from private life situations and he compares them to social claims as they occur through the system of social labour⁹⁰. This argument suffers from the fact that social relations create expectations that can acquire legal meaning through the social context they operate in. Certainly most private-life relations do not have the capacity to create legal obligations as they evade the scope of the legal system. For example the demand for the reciprocation of somebody's love as of legally enforceable right as Nozick says sounds and is ridiculous⁹¹, but this comparison is totally irrelevant. Employment relations are not private-life relations but relations of the outmost social and economic significance that are guided and monitored by law, as they determine the terms of subsistence of people but no less because it is one fundamental way through which people relate with what is originally external to them. In other words, work is by definition a public and not a private activity. Libertarians completely disregard this most important aspect of labour when they assimilate employment relations to relations as they appear in the sphere of private life. Here we see again the connection with classical liberalism that perceives employment as a relation between private individuals. However the arguments that support employment at will are far more

⁸⁹ Ibid. (1995) pp. 310-311.

⁹⁰ See Nozick (1974) p. 237.

⁹¹ Ibid.

extreme since not only they place employment under the exclusive jurisdiction of private law as classical liberalism would have it but rather deprives from any legal content altogether. The argument here dovetails with the economic approach to employment as mainly expressed by Richard Posner who uses extreme libertarian arguments to make employment at will a relation of purely economic determination with the only legally enforceable obligation being the payment of remuneration for the task performed. For example, Posner says that in life people harm and get harmed by others by their action either willingly or unwillingly without a compelling reason to do so⁹². Therefore, an employee who gets harmed by an arbitrary decision of an employer to dismiss her/him faces a typical condition of life that need not be covered by a legal provision. As Posner says the jilted boyfriend has no legal recourse for the pain he has suffered. Love is not a legally enforceable obligation. However, and in order to make the distinction between relations that can acquire legal meaning and the ones that cannot I will just say that the jilted boyfriend may not have recourse to the legal system for being jilted and rightly so but the jilted spouse does. The difference lies in the fact that the boyfriend's claim cannot be processed by the legal system since affective matters do not fall within its jurisdiction. On the contrary, the jilted spouse's does have a legal claim since marriage is a legal institution of the outmost social significance. In a sense it can be said that the obsession of libertarians no is to push labour relations outside of legal sphere and consequently of the public domain. Employment here is not as classical liberalism and libertarianism would have it an economic relation with a legal -albeit only contractual- dimension (that under the monitoring of the law acquires a public dimension) but rather an economic relation of no public interest whatsoever! Moreover, arguments in support of the position of 'employment at will' such as that - given unemployment insurance and welfare - the loss of a job eventually is something not that tragic or that workers who are afraid of the sense of insecurity that employment at will entails can go and work where job protection does exist, sound in the first instance contradictory as they presuppose what as a matter of principle they want to abolish and in the second as out of sync with the social reality they pretend to describe⁹³.

In a sense we can see that employment at will fully encapsulates the logic of the assimilation of labour from property in a condition that property does not depend in

⁹² Posner (1995) p. 305.

⁹³ Ibid. (1995) p.303.

any way on social recognition. Labour through contract becomes property's own. It can therefore be submitted to its power to use, destroy or dispose of it in any way property sees fit without society having any right to intervene. Eventually the pretences for the protection of individual freedom and autonomy come down to the attempt of the legitimization of the most blatant form of coercion.

5. Libertarianism and the Collective Organisation of Labour.

What our analysis has shown so far, is that for libertarianism labour relations are economic relations of legally mediated exchange that involve two individuals, a seller and a buyer, with the labour power of the former being the object of the transaction. According to the doctrine of freedom of contract these two individuals are free to shape the normative content of their relation on the basis of their individual autonomy with the aim of promoting their respective self-interests, under the guarantees that the rule of law provides.

We have confronted the consequences of the legal understanding of labour as a strictly economic relation of exchange on the basis of the understanding of labour already advanced. Our starting point is the ambivalent nature of employment as simultaneously a social and an economic relation of conflict and interdependence. We have seen in part one that employment is a power relation that is determined by the power relation between property and labour. We have also seen that the condition of conflict and interdependence of the parties is a structural condition of employment that cannot be negated within capitalism. Our aim here was to show that the libertarian understanding of employment by ignoring the complexity that this ambivalence creates and promotes a model of it that is based on the determination of labour by property that has as its end result the complete domination of labour by property.

We have seen many facets of this de-recognition and reduction and I will limit my analysis here to a brief analysis of the libertarian attitude towards collective organisation.

We have examined the approach that libertarians take towards the labour force as a collective entity and as a holder of collective rights. The methodological

individualism of libertarians and its ideological hostility towards collective entities does not allow them to recognise the collective right of labour over a socially legitimate notion of fair remuneration nor the right to act collectively on the basis of the principle of unity and solidarity (rights that stem from the collective character of the production process). As a result, labour organisation is not recognised as a valid form of labour representation because labour is not recognised as a collective entity. This has as a consequence the opposition between wage labour and capital is denied its character as a structural opposition between social forces as it is subsumed under the notion of competition as the generalised form of human action. Market competition as the all-encompassing form of social action absorbs structural oppositions between social forces. In the market determined society, social groups cannot be opposed to each other for the attainment of diverging, conflicting ends. This perception results in the transformation of the structural opposition between property and labour to the horizontal competition between employees. Workers compete between. As in any other market the worker competes against worker in their capacity as sellers of the same commodity. Structural conflict becomes individual competition. This logic has as a legal result the notion that workers as individual producers, as property right holders over their labour power, when organised should be confronted by anti-trust legislation under the legal logic that regulates competition in the free market⁹⁴. Eventually employment is normatively perceived under the schema of horizontal, competitive exchange of property rights.

However, the property right of the employer over the means of production and on the product of the labour process is real whereas the property right of the employee over his/her labour power is fictitious. Moreover, the perception of labour as a market category reduces its collective character and reduces it to a private concern between individuals. It is therefore natural that libertarians deny labour organisation as a form of social collective action. We can see now how the libertarian model of horizontal competition between employees has as a result that workers, as competitors, do not have a community of interests. The legal arguments that libertarians use in order to deny the collective claim of labour are again provided by the application of the theory

⁹⁴ Posner (1986) pp 133-138. However, one cannot avoid the temptation of noticing a huge contradiction that can only be explained through the ideological opposition of the proponents of employment at will to organised labour. Employment should not have a legal content unless labour is organised! In this case the most severe anti-trust legislation should be applied as if trade unions were the dreaded monopolies that would destroy the function of the free market!

of freedom of contract. For libertarians employment is a private concern between two individuals. And while one might argue that no modern legal system denies collective organisation and that no government, even those with the strongest libertarian ideological orientations, has ever attempted to abolish the collective organisation of labour, the libertarian polemic against trade unions ranges from the strengthening of the legal position of the employer against them⁹⁵ to their complete abolition⁹⁶. And to a large extent their success has have forced a serious re-thinking of the agendas: experience has shown that neo-liberal governments have pursued consistent strategies that aim at the weakening of their power and the attenuation of their role in industrial relations⁹⁷.

6. Conclusion

In concluding we could say that the libertarian approach legitimises the domination and the determination of labour and consequently of the person of the labourer by property.

Labour is considered as something external from the worker who offers it for the use of another. Our point is that libertarianism by perceiving the market as the space for the determination of the values of labour as an object of market exchange does something more than treating labour as a simple market commodity. It determines labour as a contingent relation of economic exchange by thus trivialising the relation of humanity to labour by negating the inherent connection between them. This reduction of labour to a market relation of exchange determines the approach of the organisation of employment as a generalised social relation. This is so since the notion of economic exchange cannot perceive the ambivalent nature of employment as a dialectical relation of conflict and interdependence and of labour as an action with both economic and social significance. This is so since economic exchange in capitalism as we have seen reduces otherness to similarity. On the contrary libertarianism does not recognise the employee as the other that acts under a different rationality and pursues interests of a different order than the employer. The

⁹⁵ Epstein (1984) pp.963-965, Posner (1980) pp. 133-134.

⁹⁶ Hayek (1980), (1982) Vol. 3 pp. 131-134, Posner (1984)

⁹⁷ Dickens, L. (1994) pp. 225-248 see also Hepple (1995) p. 304.

recognition of the complexity of employment presupposes the recognition of the otherness of the other. And it is exactly this otherness that is being suppressed in the economic perception of employment by denying labour the legitimacy of its difference to the logic and interests of property. In a sense we could say that what libertarianism attempted to do is to deny this dual character through the assimilation of labour to property and impose the figment of the homogeneity of interests and rationality in employment. In a sense we can say that libertarianism typically represents the denial of the contradictory character of employment. However, to recapture the thread of our analysis at the end of chapter the ambivalent nature of employment may be suppressed but it may not be annihilated since it is a condition that stems from the irreducible social character of labour. We will not repeat that analysis here, what we will only say is that what libertarianism attempts to eradicate what by its nature cannot be eradicated.

CHAPTER THREE

EMPLOYMENT, THE WELFARE STATE AND BEYOND

Introduction

In the previous chapter we dealt with the libertarian perception of employment not as an abstract ideological construction but rather as representing a consistent line of reasoning that has been implemented through legal policies and political programs, in different political and historical contexts. To put it in concrete sociological terms both classical liberalism and neo-liberalism –although they do not develop it explicitly- contain a comprehensive theory of labour. We now turn to the welfare state as the main opposition to the liberal and neo-liberal perception of labour within the context of capitalism. What our analysis will attempt to demonstrate is that the welfare state, despite its major inner contradictions provides the main opposing paradigm (within the context of capitalism) to the liberal and neo-liberal understanding of employment. This does not mean that we have a clear-cut relation of opposition; instead the welfare state provides a different approach to the ambiguities of employment without challenging the basic premises of capitalist economy and without challenging the existence of the free market. In a sense we can say that we have two paradigms that have opposing yet complementary views on employment. We say here complementary because they both accept the determination of labour by property in capitalism and opposing because they have opposing views as to the limits and purposes of this determination. In this sense we will deal with sociological ideal types that despite the fact that their inner contradictions do not allow them to be uncritically subsumed under the schema of opposing descriptive typologies represent opposing points of view on employment.

We will focus our analysis on how the transformation of employment under the policies of the welfare state captures and expresses the ambivalent character of employment as a relation of conflict and interdependence. The crucial factor that we

have to stress is that the welfare state shapes its policies on the basis of the assumption that apart from its economic dimension employment exists within a certain social and institutional context that largely determines its specific content as a concrete social relation that produces actual social results. In other words we can say that the model of employment that the welfare state promoted is structured around the notion of the social significance of labour.

As we have seen libertarians consider employment as a private economic relation that should be regulated by private law. This approach that we can say was predominant during the largest part of the 19th century was to a wide extent substituted by another that tried through the intervention of the state into the function of the market to mitigate the extreme social inequalities that the latter brought about. The state approach towards employment brought about a different understanding that redefined its content as a social relation. As we have seen in the previous chapter employment in capitalism is a relation between labour and property whose character is determined by the rationality of the market. In this chapter we are going to see how this relation takes its shape through the mediation of the logic of the welfare state. In this respect we will start with a short analysis of the transformation of the state and the law through the emergence of the welfare state and we will focus on the phenomenon of juridification. We will continue by analysing its approach towards labour and employment and see how the rationality of its intervention is based on the acknowledgement of the social significance of labour. What we are going to argue is that in the welfare state labour refers to the general social structure and is therefore subsumed under the logic of the protection of the general social interest¹. Under this logic the welfare state recognised the collective character of labour and promoted and institutionalised labour organisation. However this was achieved at the cost of the suppression of the conflictual element of employment, a suppression that was justified in the name of the social balance that the welfare state had as its major aim. Our final point will be that the welfare state despite its unquestionably positive contribution to the improvement of the conditions of living of employees failed to contain the underlying ambiguities of employment. The somehow ambiguous result of welfare state policies is that by subsuming employment under the logic of conflict

¹ As Habermas has shown the role of the state as the guarantor of the general social interest occurs before the welfare state in the democratic constitutional state where it is legitimated through political representation through general and equal suffrage (Habermas (1987) p. 357. On the same issue see also Luhmann (1990) p. 14.

pacification did not allow the dynamics of the relation to be expressed in their full normative potential.

1. *The Emergence and the Rationality of the Welfare State*

At this point we will briefly deal with the phenomenon of the welfare state as a reaction to the consequences of the implementation of the principles of the liberal ideology. However as the issue has been extensively analysed and as it is more than well known we will focus this short exposition to the points that have to do with the rationality of the intervention of the welfare state in employment.

We have seen in the previous chapters that liberalism assigns a certain role to the state, namely that of protecting already existing natural rights. In libertarian theory the spontaneous market order precedes the liberal state. The latter comes about in order to protect property, to enforce contracts and to protect individuals qua market actors from force and fraud. The demarcation line between the respective domains of the state and the economy is clear and unambiguous² with the former subordinating the latter to the needs of the free market. This relation especially during its earlier period was one of positive subordination, in the form its total abstention from the function of the market. Under the schema the state mechanism, namely the administration, the legal system and the system of power politics operated in isolation to the function of the market economy, with the latter being the dominant social system that through its unimpaired function could impose its demands on society. However the expansion and the ever increasing complexity of advanced capitalist societies have laid to a condition of increased differentiation on the one hand and interdependence on the other, between the state and the economy. This paradoxical relation becomes one of positive subordination in the sense that state mechanisms although they are functioning autonomously in the sense that they are pursuing their own ends, contribute positively to the function of the free exchange market. The market therefore needs the positive contribution of the administration and the legal system in order to continue its function and produce its optimal results. This does not only have to do with the role of the state mechanisms as compensating possible market failures but moreover with existence of a sophisticated systemic complex that assures the

² See among others J. Habermas (1987) pp. 358-361.

reproduction of the market economy³. What should not be forgotten is that the common thread between these two phases of the relation between the state and the market is the priority of the latter. However, with the emergence of the welfare state we have a substantial transformation in this relation of between the state and the economy.

The welfare state emerged as a spontaneous political reaction to the social consequences of the market⁴. Historically, social legislation was a spontaneous reaction that attempted to mitigate the extreme social results that the industrial revolution produced. Planning was not as Hayek claimed an effort of some arrogant mind to impose its arbitrary constructions to society but on the contrary a spontaneous social and political reaction to the major social disturbances that the abrupt introduction of the free market social model caused on a society that was violently transformed in a very short period of time. As Polanyi has succinctly remarked: *'laissez faire was planned, planning was not'*⁵.

Under this prism the policies of the welfare state should be seen as an attempt to mitigate the social effects of the unfettered function of the market. Nonetheless, the relation of the welfare state to the market is rather problematic and in a sense ambiguous.

The welfare state in its self-perception as the authentic representative of a general social interest (through the legitimation that the political system receives through the majority rule in the constitutional state) intervenes through central economic planning in the economy so that its function will not have detrimental effects to society, which in this case is represented as a functional, integrated whole. This approach nevertheless does not question the autonomy of the economic system nor does it challenge the structure of the free market. What it does is to give to the economy long-term directions in the form of incentives and disincentives for economic activity. Moreover it confines the social results that the market produces within socially acceptable and institutionally prescribed limits. In other words, the welfare state does not challenge the substance of the social relations that the capitalist economy produces. Nonetheless, it is opposed to the notion of a free market society, in the sense that unlike the state in a catallactic society prescribes the limits of economic

³ For the definition of the concepts of negative and positive subordination see Offe, C. (1984) pp. 38-39.

⁴ See amongst others the excellent analysis of Polanyi in Polanyi (1957) especially pp. 86-102

⁵ Ibid. p. 141

action. Moreover unlike the catallactic model it guarantees that the social costs of the market will not undermine the stability of the society as a whole. An additional and most important difference is that the welfare state is not an institution that comes to existence through and for the market. On the contrary it considers itself as above the market. This entails another crucial distinction. As such the welfare state firmly resists the notion that all interests that exist within the society are individual interests that should be pursued through action in the free market. On the contrary the welfare state acknowledges the existence of valid collective interests the satisfaction of which cannot be attained through the free market. As a result the ideal of social justice is not an empty mirage as Hayek would have it but rather a most significant aim towards which the welfare state concentrated its efforts. For the welfare state all interests that can be represented within it are deemed by it as valid. The welfare state has the task of attempting to compromise and combine them in the name of an all encompassing general social interest that it allegedly represents and to which all partial, non-generalisable interests refer to. Moreover, on the basis of this legitimacy it creates a self-perception that allows it to become the arbiter of these interests since it is from their compatibility to the common good that they derive their validity and legitimation.

2. The Legal System in the Welfare State

Probably the most prominent characteristic of the welfare state is that given its comprehensive role as a vessel of the common good is an expansionary state⁶. The welfare state as a regulator has the tendency to extend its boundaries by taking over and solving problems including those that are created from the function of other social systems⁷. Eventually the aim of the welfare state becomes the achievement of a balance between the function of social systems, a balance that is seen as a precondition for the unimpaired reproduction of the societal system as a whole, a reproduction that the welfare state perceives as its primary task⁸.

⁶ Luhmann (1990) pp.71-72

⁷ Ibid. pp. 74-75.

⁸ See Luhmann (1982) pp. 229-237.

We mention this at this point because the expansionary nature of the state as a representative of the common good is the factor that determines the character of its intervention in employment relations. What our analysis leads to is the approach of the welfare state towards conflict as it stems from social relations. It is in this context that we should see the approach of the welfare state towards the ambiguities of employment, especially in what concerns its conflictual dimension. As Luhmann has put it the mechanism of the state is an *'official cycle of power rests on legally regulated authority, and therefore is capable in prevailing in cases of conflict'*⁹. It is this ability of the welfare state to impose its solutions to conflicts that we are going to address next.

2.1. The value orientation of law

Social conflict in this context loses the abstract character that it had under the liberal model and acquires a visible, concrete character as an actual social problem. The law does not give solutions to legal disputes between individuals, disputes that can be subsumed under rational and abstract rules as the rationality of the system of the rule of law would have it; it rather makes value judgements on actual problems that can upset and endanger the societal balance. In other words it gradually abandons the formalistic approach of liberalism and moves towards a model that has been described as material law¹⁰.

This model of law, which in modernity is inexorably connected to the juridification process¹¹, brings about the dynamic encroachment of the state through the medium of law, into previously unregulated or self-regulated social fields of action. (i.e. the economic system, the educational system, the family, etc.). The 'materialisation' of the law meant a deep change to the system of legal values. Instead of the abstraction of formal freedom and equality between market-oriented legal persons we have the promotion of freedom and equality as actual social values, through the recognition of the inequalities that the market produces. The law in the welfare state is active and it takes sides: It is no longer oriented towards safeguarding the rules of the market but rather towards the realisation of social values that now take

⁹ Luhmann (1990) p.49

¹⁰ For the concept of the materialisation of law see Habermas (1996) pp. 392-409.

¹¹ For the concept of juridification see Teubner (ed.) 1987 and Teubner (1987b). See also Habermas (1987) pp.356-373.

the form of legally enforceable rights for those that the market has put in a position of weakness and vulnerability.

In consequence, the central value to be protected by the legal system is no longer that of formal legal freedom and equality but rather that of equal substantive capacity for action¹². In other words the state attempts to mitigate the results that the abstraction of the free and equal individuals creates. Freedom and equality acquire here a new significance, not as abstract concepts but rather as values to be legally enforced. This means that the law takes a direction towards it has been described as result orientation¹³, namely towards the pursuit and achievement of substantive ends that have been set by the state in its capacity as the arbiter of the common good¹⁴.

2.2. Law and Juridification.

Juridification points to the limitations of the effectiveness of the legal approach (that the welfare state adopts) to complex social problems. In the first instance it means the tendency that has been developed in the welfare state of the subsumption of social relations under the legal system. It also means the proliferation of legal rules in two senses: First the extension of law to an increasing range of societal relationships in areas previously unregulated or self-regulated and secondly the densification of law, that is, the ascription of abstract normative definitions or ideas with legal status. This means that legal rationality is becoming more pervasive, more eminent, and more conspicuous in areas where either did it not exist or was simply implied¹⁵.

The effects of legal proliferation on the legal system itself are many. Some of them, such as the expansion of its boundaries or the increased complexity of its structure are evident. Some characteristic problems of the interaction between the legal system and the social sphere in general have been criticised by G. Teubner under the heading of regulatory trilemma¹⁶. G. Teubner focuses his critique on the problem of structural coupling namely of the capacity of the legal system to cognitively grasp

¹² See again Habermas (1996) pp. 392- 409.

¹³ Teubner (1987b) p.16.

¹⁴ As a consequence we have the taking into account by the judiciary of the social needs expressed in a legal dispute and the effort to balance them. This principle has been described as the principle of socialisation of judgement. See Ewald (1986) p. 65.

¹⁵ Habermas (1986) p. 204.

¹⁶ Teubner (1987b) pp. 19-27.

social realities and translate them into valid legal norms. Teubner distinguishes three possibilities where structural coupling may fail. The first is the mutual indifference between the legal system and the system under regulation; the second is the disintegration of the social sphere through the imposition of legal rationality and the third the disintegration of the law through the burden that increased social demands impose upon it. Here we see again what we have discussed about Luhmann's understanding of the law as cognitively open system. As such legal cognition is intimately tied to the function of law and thus to the conditions of normative success (the stabilisation of expectations).

This brings us back to the point of view of the legal method of the welfare state and its ability to translate and reduce the complexity of employment into legal norms. However, Teubner's critique indicates the limited cognitive horizon of the legalistic approach.

It is under this perspective that we should see the problem of mutual indifference and inability of structural coupling. It brings us to the inability of the law to understand that what is dealing with is a relation of extreme complexity. The problem of structural coupling apart from being a normative one is primarily a cognitive one. In order to normatively reduce the complexity of the relation the system must be able to understand it. The welfare state transposes its problems to the legal system since the latter can provide clear solutions to problems that the state as the authentic representative of the common good cannot solve. It is under this rationality that the law (as substantive law) becomes the arbiter of the validity of the social claims as they stem from the ambiguous structure of employment. It is under this perspective that we should seek the law as the medium of welfare policies.

The legalistic approach has as another effect what has been described as the blurring of the boundaries of the legal system. This effect can be seen as increased demand for litigation in areas that traditionally evaded the jurisdiction of the state. Quite often we have the political or the administrative system transposing its responsibilities into the legal system, or the legal system by its own initiative usually in the form of the decisions of constitutional or higher administrative courts to interfere in the domain of action of the political or the administrative system. In this sense we have a "blurring" of the boundaries of the differentiated functions of the state. Luhmann has attributed this phenomenon to the effort of social systems particularly of those with a predetermined function to avoid their overburdening with

decisions that imply a high degree of risk¹⁷. Our point is that this phenomenon would not be possible without the expansion of the boundaries of the legal system. The legal system eventually assumes that it can process everything, that every social relation has a legal content and thus can be subsumed under a legal rule. In view of our analysis on the cognitive incapability of the legal system to grasp the substance of employment we can only say that this approach apart from being potentially authoritarian can also be the result of a cognitive misunderstanding. However before we focus on the issues that have so far emerged so far we should first address the perception of labour and employment by the welfare state.

3. The Welfare State and Employment

We have seen in the previous chapter that labour according to the market approach is an economically quantifiable factor of capitalist production and that employment is perceived as an economic relation of exchange. We have said that the welfare state has a different perception in the sense that it recognises labour as a social productive force. We should not forget that as labour is the creator of social wealth, that it produces the vital for society relation of employment and as such falls within the scope of the definition of the common good¹⁸. For the welfare state labour is a category that has to be protected.

In commenting the relation between the juridification and employment Habermas has said that juridification *'can in fact be understood as the institutionalising in legal form of a social power relation anchored in class structure'*¹⁹. Juridification not only regulates employment, it rather starts from employment as it recognises that its structure produces the relations that determine the structure of the social sphere. In this sense juridification starts from employment and from the recognition of it being a power relation that reproduces the inequalities of the social structure. This approach however, presupposes a certain ideological orientation. It presupposes the acknowledgement of the fact that the free-market determination of labour creates imbalances to the social structure. The welfarist-legalistic approach is

¹⁷ Luhmann, N.(1993a) pp. 166-167. See also Luhmann, N. (1990) chapter two.

¹⁸ This however does not mean that it recognises its character as formative of self-consciousness. In this sense it is indifferent to it. In other words it does not deal with labour per se, it has no perception of labour per se but only of its social significance. The state does not deal with ontological categories but with relations that fall within the ambit of its authority.

¹⁹ Habermas (1987) p. 361

conditioned by the recognition of the structural inequality between the parties in employment. In other words the approach of the welfare state towards labour entails a value judgement. The approach of the welfare state is determined by its attachment to social values. The welfare state does not hide the fact that it presents another paradigm based on a competing notion of morality to the liberal one. The crucial factor here is the understanding of social responsibility. In other words the welfare state in the name of the all-inclusive common good sees public obligations where liberalism sees private good deeds²⁰. The abstract moral duty towards the other (the employee) becomes a concrete obligation with a legal character. It becomes a legal right²¹. Under this perspective interests are no longer interests of individual market actors that are determined by the logic of the market, but rather social interests that refer to common good. This principle transforms the notion of employment from a private concern between autonomous market oriented actors to a relation of social significance that has to serve the legally protected common good. Labour interests are not interests of private individuals but rather social interests that are aligned to the general social interest. As a result responsibility towards the worker is not an abstract moral duty towards the undeserving victims of the unpredictable fluctuations of the market but rather a legal duty that refers to the reproduction of the social structure itself. As such employment rights are no longer contractual rights but rather public rights to the common good. The welfare state takes employment out of the sphere of privacy and brings it to the centre of public light.

On another level we see here again the distinction that we drew on chapter one on the dependence of property on its social recognition. We have seen in the previous chapter that if we accept property as a natural right arising in a state of nature that is in need of institutional protection but not of social recognition, then we accept property as developing its own distinct logic as a self-legitimizing principle that is determinant of and in no sense determined by labour. However, if we accept that

²⁰ As we have seen, for both traditional and neo-libertarianism the idea of charity to those who unjustly suffer is considered as a good moral deed that helps alleviate the burden of the unfortunate poor and as such it should be consistently practiced and encouraged. However, charitable action should always depend on the moral good will of the benefactor and should never be imposed to him/her as an obligation, as according to traditional libertarians such a thing would diminish the moral value of the act. Therefore the moral duty towards the undeserving poor can never be transformed to a legal obligation to assist the less well off. See F. Ewald (2000) pp. 131-134. See also chapter 2 fn. 77.

²¹ As Châtelet and Pisier-Kouchner have shown the welfare state is based on the transformation of a moral idea to a political (and legal we should add) principle. Châtelet & Pisier-Kouchner (1982) pp.167-180.

property exists as a legal principle from the moment of its recognition as a right by an institutionalised form of social symbiosis then it becomes valid only within and through this institutional arrangement that determines the limits of its exercise. Practically this means that property cannot develop its own logic irrespective of the limitations that the social body imposes upon it.

This returns us to the issue of the interpretation by the welfare state of the relation between labour and property. The use of labour by capitalism is challenged by the welfare state in what concerns its consequences but not in what concerns its substance. For the welfare state the domination of property over labour is a datum. This means that the rationality of its intervention is conditioned by capitalism. Nonetheless this intervention in the name of the general social interest poses serious limitations to the results that the treatment of labour by the logic of the free market produces. For the welfare state the logic of the 'deployment' of property rights in the free market cannot disturb the balance of the societal system. This means that labour- as a productive force that exists for the common good- has rights against property; rights that derive their legitimation from labour's social role, but additionally from the recognition of it being a collective social force that is an indispensable part of an organic whole. What should be mentioned here is that one of the major contributions of the welfare state is that it does not conceal the power structure of employment. On the contrary, its policies have as their starting point the acknowledgement of the inequality between property and labour.

We have seen that labour in the welfare state is acknowledged as a social productive force that has rights in virtue of its contribution to economic growth. In a sense we can say that the major achievement of the welfare state is the restitution of labour as a most significant element of the social process; a restitution that wants to alleviate the results of its domination by property in capitalism. However, this recognition in no sense means the emancipation or the reclaim of self-determination of labour. What the welfare state has achieved is on the one hand the de-individualisation of employment relation and on the other the reintroduction of the social determination of the value of labour alongside its market one. This does not mean that the welfare state re-socialises the value of labour irrespective of the market, by normatively implementing the social interests of labour as they derive their validity from social discourses, discourses that refer to the social organic whole. It is this perception of the welfare state as at the protector of the organic whole that demands

that labour (as a part of this organic whole) should have a socially acceptable minimum standard of living.

4. Labour Law in the Welfare State

What we will turn our focus on next is how the welfare state through policies of juridification provided alongside the market the basis for the formation of employment in modernity. If the market represents the economic determination of labour, then the welfare state represents its legal one. The welfare state approach is an approach that is conditioned by the notion of the all-encompassing rationality of the law as the communication medium of the state²². Therefore to return to the main line of our enquiry the question that emerges is how the legalistic approach perceives employment. In this respect we will have to face the following questions: can the legalisation of employment with its inherent cognitive limitations provide an adequate normative paradigm for the regulation of the relation? Can the cognitive limitations of the legal system combined to the authoritative character of legal interpretations normatively express the tensions and ambiguities that are produced through it? The next question that logically follows from our analysis concerns the socialisation of labour under the aegis of the authority of the state. Namely how the value judgements of the welfare state and its ideological orientation find their expression in actual legal policies. This orientation is translated into to the compensation of inequality between the parties and to the precedence of the collective over individual rights²³. What our point will be is that the welfare state supports a model of employment that allows it to control its social repercussions. As such it promotes the consensual elements in it, in other words the factor of the interdependence of the parties, whilst de-emphasising the conflictual elements of it so that they will not threaten the social balance that itself guarantees.

²² Luhmann (1990) p. 83.

²³ P. Van Der Heijden (1995) p. 135.

4.1. Juridification and the compensation of inequality in employment

The starting point of the analysis of the orientation of labour law is the recognition of the fact that it cannot be seen as an isolated branch of the legal system. The complexity of employment and the wide areas that it affects make it necessary for it to be seen in the context of a wider social law (such as law of social insurance, aspects of corporate law, etc.)²⁴. As such labour law is attached to the rationality of the intervention of the welfare state that aims at the guidance of employment relations in the name of the general social interest. In other words in view of the social significance of labour the law has to mitigate the results of its economic use. Therefore the issue that we are going to address first address the effects of the legalisation of labour as the method of compensation of inequality.

The first result of juridification (a direct result of the expansionary character of welfare state) was that aspects of employment that were outside the scope of the law have come within the ambit of its regulatory power²⁵. Through juridification we have the abolition of the undisputed priority of contractual agreements and the regulation of the labour market by the law²⁶. We can see in this respect one aspect of the opposition between the welfare state and liberalism. The state acquires the exclusive competence in an area that according to liberalism should be regulated by the principle of individual autonomy²⁷. It is this direct determination that makes employment a public concern that falls within the competence of the regulatory power of the state that wants to uniformly shape employment relations according to its own rationality²⁸. As a consequence labour law becomes expansive and inclusive but moreover gives an official and therefore authoritative legal meaning to aspects of the relation that were either regulated through contract or through the unilateral will of the employer on the basis of his/her right to command labour. In this respect we see the role of labour law as compensating inequality by intervening in the power relation of employment with the aim of balancing the unequal power of the parties, but without intervening to the substance of the power relation. The relation of domination is not challenged per se

²⁴ Clark (1985) p. 72.

²⁵ Teubner (1987b) p. 16

²⁶ See Clark (1985) p. 72.

²⁷ See Simitis (1987) p. 135

²⁸ See Ibid. p.142.

however the state wants to unilaterally impose its content upon the parties. Employment thus becomes a relation between property, labour and the state but this time not as the liberal model would have it as a guarantor of legality but rather as the dominant part in it.

We can see this dominant character of the state in a series of issues that belong to the core of the employment relation. For example, the determination of working time, the limit and the remuneration of extra time, the regulation of health and safety at work was regulated in the past through collective agreements. Nowadays, the state in its effort to guarantee a safety net of social protection has taken them out of the scope of collective bargaining, since it considers them non-negotiable social interests that directly affect the common good. In the same line of reasoning unfair dismissal regulations²⁹ are expressive of the will of the state to determine directly aspects of the employment relation that have significant social repercussions. Dismissals are unlawful if they are discriminatory: discrimination on the basis of sex, because of pregnancy and of trade union activity is considered as unlawful. Departing from the contractual understanding of employment that considers dismissal, as a simple termination of contract, a dismissal has to be deemed as fair and be justified by the serious misconduct of the employee. Moreover, the notion of misconduct is no longer determined by the will of a party in a contract but rather authoritatively defined through the definitions and criteria of state law³⁰.

Another institution that indicates the control of the state over the labour market is that of the labour inspectorate, an institution that exists in all EU countries. These institutions are administrative organisations that have the task of monitoring the labour market and enforcing legislation. In this way not only we have state determination of the condition of employment relations, but also a direct form of surveillance over it³¹. This means that the state uses its apparatus in order not only to shape the content of employment but moreover to prevent it from divergences that may be introduced by the parties. Of course realistically speaking the labour inspectorate prevents abuses that as a result of the power positions of the parties can mainly come from the part of employers thus being a natural ally and therefore much

²⁹ For a brief outline of the legislation of unfair dismissals in the EU see Barnard, Clark and Lewis (1995) pp. 32-41.

³⁰ For dismissal regulation in the UK see Deakin and Morris (1995) chapter five, Collins, Ewing & Mc Colgan chapter five and Collins (2003) chapter eight.

³¹ For the position of Labour Inspectorates in the EC countries see Barnard, Clark and Lewis (1995) pp. 13-14.

welcomed by employees³², it nonetheless signifies the intention of the state not to tolerate divergences from what it has normatively prescribed as the content of employment.

We can see now a major source of opposition between the welfare state and neo-liberalism. The welfare state intervenes and limits the scope of the application of the founding principle of liberalism i.e. individual autonomy in order to compensate for a social situation that liberalism does not admit as existing i.e. inequality between property and labour on the basis of a principle that it considers as non-valid i.e. social solidarity. What we are going to see next is the rationality of the other main principle of labour law namely the precedence of the collective before the individual, its opposition to liberalism and its consequences for social action.

4.2. The collective character of employment in the welfare state

We have said that the welfare state is characterised by the attribution of the abstract moral duties towards the socially weaker members of society with legal status and their subsequent conversion to legally protected rights. In this respect we move away from the contractual model and the limitations that the legal understanding of employment as an interpersonal relation of exchange imposes. On another level, the recognition of the social character of labour forced the legal system to overcome the individualistic approach of liberalism and acknowledge the fact that employment is not an economic relation of exchange between two property right holders but rather a social relation between property and labour. As such the right of association, that expresses the right of labour to be legally represented as a collectivity, becomes institutionalised as an essential part of labour law.

4.2.1. The institutionalisation of class conflict through collective bargaining.

Through its institutionalisation collective bargaining acquires the status of a basic regulatory mechanism of employment relations. In this section we will see how the institutionalisation of collective bargaining ensued in the transformation of the confrontation between property and labour from a social struggle that was conducted

³² See Collins, H. (2003) p. 11

on the basis of the contradictory power relation to a legally mediated relation that is subsumed under the notion of the general social interest.

The principles that underlie the conduct of collective bargaining are a legal and a normative one: namely that of the public status of the parties involved in the process and that of collective autonomy. According to these principles the collective entities that are involved in this process that is trade unions and employer's associations that as legal persons through a negotiating process shape the content of employment relations through the conclusion of collective agreements that establish obligations (that is legal obligations with the exemption of the UK³³). This outcome is the point of convergence between two originally diametrically opposed positions as they express diametrically opposed interests, to the point where a compromise can be reached³⁴. The points I would like to focus on at this stage are: 1) the institutional network in which this negotiation procedure is conducted as it expresses the ideological basis for the institutionalisation of collective bargaining and 2) the effects of the institutionalisation³⁵ of labour movements on their relation to their members.

The recognition of public status to worker's organisations signifies a major change in the conceptual understanding of employment. Through the institutionalisation of collective bargaining we have the recognition of the validity of different interests that are expressed in employment. These interests are justified on the basis of different discourses, but also on the basis of the principle that no part in employment has a universally valid claim³⁶. On the contrary this claim of universality is attributed to the welfare state itself that monitors the procedure in the name of the common good, the meaning and content of which it defines and represents.

The stake in collective bargaining in its institutionalised form is not predominance or supremacy of ideas and worldviews but a minimum basis for the necessary cooperation that is an imperative condition for the smooth function of employment as a relation that directly affects the common good. The conduct of collective bargaining under these conditions released the legally recognised collective

³³ In the UK collective agreements are considered not as contracts but rather as non-binding informal agreements that cannot be legally enforced. See especially Morris and Archer (2000) pp.288-291.

³⁴ At this stage we deal with collective bargaining at the societal level as understood by the rationality of the welfare state. For the logic of collective bargaining as the institution of that regulates the confrontation and compromise between property and labour see chapter four section four.

³⁵ For the issue of the institutionalisation of labour movements see Offe (1985) pp. 220-258.

³⁶ See also Ewald (1986) p. 48. Although Ewald's approach is based on the Durkheimian notion of solidarity that explains succinctly the "mechanism" under which the state is legitimated to demand concessions from social groups in the name of its absolute right.

entities³⁷ from the hostility of formal law and allowed them to engage as self determined actors in a process of pursuance of strategic and substantive goals. This had as a result that labour was recognised as an institutional actor that legitimately as a collective group shapes the content of employment together and simultaneously in opposition to employers. The crucial difference here is that in this procedure the actors are not market oriented individuals, but rather represent determined collective social forces. In this respect we can see the difference in the perception of autonomy between the welfarist and the liberal understanding of action. In the second model action refers to the individual qua pre-socially determined market actor. In the first to the collectivity as representative of socially determined interests that refer to the common good.

Although no one can deny the fact that the process of institutionalisation of collective bargaining had and still has extremely beneficial effects to the welfare of employees and that its purpose was to guarantee the space where the autonomous action of collective groups such as trade unions, its conduct under the auspices of the rationality of the welfare state that conditioned its outcome to its beneficial contribution to the common good had some considerable side effects.

First of all the recognition of a trade union depends on its conformity with the prescribed standards that are set in state laws. Characteristic is the fact that the recognition of the constitution of trade union has to be approved by the judicial authorities. This means that the recognition of a trade unions as an autonomous institution with public status is done with the presupposition that the autonomy that has been recognised will be exercised only within the limits that are prescribed for it in the legal institutional framework of society. As Offe has remarked: *'In a typical case, access to government decision making positions, is facilitated through the political recognition of an interest group, but the organisation in question becomes subject to more or less formalised obligations, for example, to behave responsibly and predictably and to refrain from any non negotiable demands or unacceptable tactics'*

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³⁷ This reference is mainly made to labour, since the capital has wider margins to follow individual strategies, in order to promote its interests See Offe, (1985) pp.248-253. That is why the recognition of public status to private interest groups is generally seen as an achievement of workers and as a concession on the part of employers.

³⁸ Offe (1985) p. 235.

As a result collective bargaining is seen as a form of conflict that may potentially threaten the social balance. Therefore, the state cannot allow the actual power positions of actors to be translated into impositions of demands, especially if this imposition may result into a threat to the vital interests of either of the negotiating parts. This indicates that welfare policies cannot accept the economic system to be overburdened with 'concessions' to workers that assumedly may threaten its stability to the same measure that they do not want the social effects of unfettered economic action. Institutionalised collective bargaining is a struggle conducted under the aegis of the state in its capacity as guarantor of social coherence. Collective bargaining becomes a device to reduce the sharpness of adversarial strategies on the part of both property and labour and to guide class conflict towards resolution. In other words the state allows the conduct of conflict as long as it does not escalate to situations that it cannot control. As Benjamin has remarked in reference to the phenomenon of strike, the state as the sole representative of the exercise of legal violence can recognise and accept it to the extent that it does not threaten its monopoly³⁹. The legal framework exists to make sure that this happens.

In this respect employment becomes de-politicised in the sense that the conflict between labour and capital loses its character as a social class relation around which the political system is constituted and becomes mediated relation of interests that is subsumed under the goal of conflict pacification⁴⁰. In this respect the institutionalisation of collective bargaining through the recognition of the public status of collective groups can also be seen as an attempt of the state to control collective autonomy⁴¹. Therefore, the institutionalised recognition of collective actors in employment without the curtailment of collective autonomy can be seen as a valid and relevant demand⁴². However, the problem is whether trade unions at their present form can rise to this challenge. It is on this issue that we will turn our attention next.

4.2.2. The institutionalisation of trade unions

The attribution of public status to trade unions has created a new reality in what concerns trade unions themselves. In this new reality trade unions have to deal with

³⁹ Benjamin (1979) p.137

⁴⁰ See Teubner (1987b)

⁴¹ See especially Schmitter (1979), Panich (1979)

⁴² See Streeck and Schmitter (1984) and Teubner (1986).

new challenges that concern both their legitimisation as public bodies but moreover, the internal legitimisation of their leaderships, a legitimisation that has to be conferred by their grassroots basis. External legitimisation can be achieved on the basis of the recognition of their role as a factor of social cohesion and on the basis of the fact that they represent the interests of a substantial proportion of the population. This assumption on the part of the legal system in order not to be relegated to a formal criterion has to be expressed by the fact of the active participation of workers. The problem that emerges is that the conduct of collective bargaining is a complicated procedure. Trade union representatives have to be able to deal with complicated and delicate matters, a condition that presupposes a high degree of specialisation. This has gradually led to the creation of an elite of professionals that has been alienated from the grassroots of the labour movement⁴³. Eventually this development transformed trade unions from movements that promote the interests of workers as a collective entity in the social and political arena, to official bodies act with the aim of promoting and supporting the interests of their members only. The specialisation of trade union executives has gradually led to the adoption of a corporatist structure with the attribution of specific roles to them. The position and status of trade unions becomes distinctly different under these terms. The relationship between the trade union and its members becomes the impersonal relation between a provider of services and a client, where no actual bond of solidarity exists⁴⁴. What is meant by this is that trade unions have become bodies of representation of partial interests that people join in order to have a representation in order to attain better working conditions and protection in case they face difficulties in their workplace. Trade union participation is no longer participation on a collective body on the basis of class solidarity but rather a rational decision on the basis of the promotion of individual interests. Loosely speaking trade unions can be seen as 'quasi-companies' that on the basis of their expertise effectively protect and promote workers interests. Instead of the labour movements extracting their power from the strong bonds of class solidarity, we have institutionally recognised public organisations, the survival of which depends on their ability to comprehend and respond to the framework of rights and duties that legal rules impose on their members.

⁴³ For the most classical analysis of trade union elites see Michels (1959) especially parts two and four.

⁴⁴ Simitis (1987) p.141.

These limitations on the ambit of action of trade unions and their subsequent alienation from the rank and file, has led to a deficit in terms of their dynamism and their radicalism. Institutionalisation may have helped help trade unions to attract members⁴⁵ - welfare state policies have substantially contributed to the increase of trade union membership⁴⁶-, but they do lose out in terms of the commitment and the loyalty of these members as the latter do not participate actively in the decision making process but rather accept decisions that have been taken at a level where they have no access to. Trade unions by accepting the- indeed privileged- framework of action that the welfare state imposed on them became organised bodies for the promotion of interests through their institutionally conferred ability to have access to the decision-making mechanisms of the state.

Eventually, one can say that the institutionalisation of collective bargaining ultimately has achieved what the coercive strategies of the liberal state could not achieve; that is the incorporation of labour movements into the rationality of the capitalist system⁴⁷. However, what liberalism has not achieved through coercion the welfare state has achieved through recognition and participation. The welfare state by recognising the conflictual character of employment and by actively promoting workers' interests incorporated labour into the logic of the promotion of the common good. In other words by recognising the aspect of conflict it managed to promote interdependence, an interdependence that was guaranteed under its own power. By incorporating the interests of labour as legitimate it managed to annihilate the threat that labour organisation could pose for the capitalist system in conflictual terms.

We have seen so far the major transformations that the welfare state brought about in employment. It is the consequences of this perception that we are going to analyse next. What we will particularly focus on is whether the legalisation of employment has managed to successfully express its tensions and ambiguities or whether it has presented us with a well-intended but eventually ambiguous compromise.

⁴⁵ Particularly in cases that were quite common in the 60s' and 70s' where trade union participation was compulsory for workers at certain workplaces or even whole sectors of the economy. For this issue section *infra*.

⁴⁶ Although this trend has started to be reversed and in our days trade union membership is very low. Rogers and Streeck (1995) p.3-4.

⁴⁷ See for example Esping -Andersen (1976) pp. 4-5.

5. Juridification and the Ambiguities of Employment

What we have seen so far is that the eventual outcome of juridification of employment was the conduct of class conflict under the auspices of the law in the name of the common good. What is of interest to us here is to see now is to look at the logic of the reduction of complexity under the rubric of juridification as it operates in the legal system in order to iron out ambiguity, suppress paradox and generalise normative expectations in the workplace.

The cases where the eventual outcome of an industrial dispute is decided by the judiciary are many and cover a wide range of its aspects whether of collective or individual character. The case where a judge decides the outcome and gives a definition of the content of an industrial dispute is the rule in the welfare state. However, the judge does so according to the criteria of the legal system. Legalisation changes the field the dispute is going to be decided on. What the judge has in front of him/her is not an aspect of social conflict but a legal case. S/he does not see conflicting interests, rationalities and discourses but rather competing legal claims that have to be decided on the basis of the legal distinction legal/illegal⁴⁸. However, under this perspective the substance of the conflict is mutated. It is no longer a conflict of interests, rationalities and discourses; it is a difference between two litigants in a legal case⁴⁹. The legal system unlike political groups does not think in terms of conflict⁵⁰. As we have seen the principle that the legal system functions under in the welfare state, is the promotion of the goal of societal stability through the resolution of these conflicts in a way that will not affect the balance of the reproduction of the societal system. In this respect social conflict as conflict between interests, rationalities and discourses is reduced to a series of individualised disputes that acquire their meaning through the legal system. As we have seen the welfare state recognises conflicting groups but under the precondition that their conflict will be conducted under the terms that itself prescribes through the legal system. Therefore any form of collective action in order to attain access into the legal system and project its claim must relinquish its constitutive element, namely its radical conflictual identity. Moreover, an identity that is constituted around the conduct of struggle can

⁴⁸ See Luhmann (1992)

⁴⁹ For the understanding of the legal understanding of discursive difference see Teubner (1997) especially pp. 166-167.

⁵⁰ Christodoulidis (1998)

only have extra legal content⁵¹. By being subsumed under the rationality of the legal discourse the original conflict between property and labour is being neutralised in its substance. What we have instead is the legal system through its authoritative definitions, determining both the rules and the boundaries of conflict, which eventually loses its character as a social conflict between the forces of property and labour.

As a result we have a condition that has been described as expropriation of conflict⁵². By this term, another aspect of the phenomenon of the enhanced role of the legal system in society is illuminated. This term expresses the fact that the conflict is taken away from the originally parts of it. It is no longer the trade unions or the employers, labour and property, who are confronted but rather legal cases to be decided by a higher order of authority that determines it in its substance. The outcome of the conflict does no longer depend on the strength and the strategies of the parties but rather on the authoritative definitions of the legal decisions that decide its content on the basis of the legal rationality of conflict pacification. Conflict apart from being mutated and transubstantiated to a one-dimensional legal dispute, is moreover alienated, taken away from its original field.

However, by suppressing and eventually suspending conflict it stifled the dynamics of collective action as structured around organised labour movements. In a sense we can say that the legalisation of employment created a phenomenon where the legal understanding of employment contradicts its actual reality. The approach of welfare state law to employment could be characterised as a case of normative legalism, a term introduced by U. Beck that illustrates the contrast between institutionally planned and socially valid normality⁵³. What we mean by this is that the institutional understanding of employment can often be in contrast with social reality. The problem has to do with the ability of the law to help and enhance social communications. As Teubner has noted: *'The price of interference between law and the lifeworld'⁵⁴ is thus a loss of motivation. Legal communications reliably motivate*

⁵¹ See Christodoulidis (1997) pp.190-191

⁵² See Teubner (1987b).

⁵³ Beck (1992) p. 134.

⁵⁴ Lifeworld is a term (originally used in a completely different meaning in phenomenological philosophy of E. Husserl) developed by J. Habermas. For Habermas the lifeworld is that part of society that is distinct and free from the main organised systems of power, namely the economy and the state and represents the aspects of the free development of cultural discourses, free social discourses and discourses concerning the free development of the human personality. In a sense one could say that for Habermas the lifeworld is the sphere of social interaction that is left outside of the ambit of the

*only legal communications. It is well known that their capacity to motivate general social communication is very limited*⁵⁵. This lack of motivation in the lifeworld creates a 'normativisation' of social life, particularly in areas that so far evaded institutionalisation. This is the crucial factor that stifles the potential for the creation of relations of solidarity and as a result the dynamism of labour movements. As Adorno has remarked, the notion of the individual has not been liquidated and most of all not diluted into formations of solidarity. The individual exists objectified, neutralised, standardised⁵⁶. This situation has been characterised by Habermas as colonisation of the lifeworld where lifeworld communications and structures are overpowered by the rationality of systems of organised power such as the state and the economy⁵⁷.

6. Employment under the Auspices of Law

What we have seen so far is that the welfare state has a position towards employment that despite its undeniable benefits had some contradictory and ambiguous side effects. First of all in the legal understanding of employment conflict is a condition that is acknowledged as a datum that has to be compensated on a consensual basis with the view of serving an abstract wider social interest to which this relation supposedly refers. As a result we have a paradox in the sense that the recognition of conflict presupposes the rejection of its source. Conflict is recognised not as a structural condition that stems from the ambivalent relation between property and labour; on the contrary it is acknowledged and dealt with as an unfortunate social fact that can be contained within the scope that the state prescribes as acceptable. In this sense the aspect of interdependence in employment is upheld as the value to be promoted at the expense of the de-recognition not of conflict per se, but rather of its significance, its source and its intensity. In this sense conflict is recognised as

organised systems of power. In a sense this distinction is very close to the one we make here between the economy or the state on the one hand as systems of organised power and society as a field of production of needs, rationalities and discourses that oppose these systems. For a detailed analysis of the concept see Habermas (1987). lifeworld as a term is very

⁵⁵ Teubner (1993a) pp. 90-91.

⁵⁶ Adorno, T. *Minima Moralia* Cited in Habermas J. (1975) p.127.

⁵⁷ Of course J. Habermas has given to the term colonisation a wider meaning (see Habermas *The theory of communicative action* vol. pp. 332-373 and particularly p. 356), but here we are interested in one dimension of it that is the normativisation of social life.

existing, but through an approach that wants to eliminate it as a social evil⁵⁸. The law encounters and deals with conflict as a pathological phenomenon to be overcome and as an occasion that calls forth a legal solution. In a way we can say that it regulates what it can understand under the perspective that it understands it. However, this legal treatment cannot eliminate employment as a major source of social conflict. The reasons that create it remain unaltered by its legal regulation in the welfare state. As such we can say that the welfare state recognised inequality as a source of undesired social conflict and intervened. However, the intervention did not and could not solve the conflict. On the contrary by regulating aspects of employment it just managed to suspend it.

In this respect and again without denying the positive contribution of the welfare state⁵⁹ we are looking for this new 'magic' legal formula through which we can achieve both autonomy for social discourses and social action, an autonomy embedded in a lifeworld free from external determinations and the regulatory coordination of autonomous social systems on the basis of recognition of diversity on a non-hierarchical basis. It is on the basis of such a legal understanding that recognises inequality but moreover conflict and autonomy that employment can be perceived as it is namely a contradictory power relation of conflict and interdependence between property and labour.

7. Employment in the Welfare State and the Market Society. Instead of Conclusion

In concluding I would like to make a summary of what we have discovered in the last two chapters. The reason for this is that in under different guises and variations the welfare and the catallactic model represent the two basic paradigms that compete for the determination of employment in modernity.

⁵⁸ Here the similarity between the welfarist and the communitarian approach is apparent. Communitarianism holds more or less the same values but nonetheless projects another way towards their attainment, a way that attempts to circumvent the authority of the state but

⁵⁹ The contribution of the welfare state to the amelioration of the social condition is denied only by hard-line neo-liberals. Hayek for example attributes the improvement of the condition of the working class solely on the market and rejects the idea that the welfare state and trade unions had any contribution to this end. Hayek (1982) Vol.2

We can see this first of all on a historical basis. We have the free market emerging as a reaction to the paternalistic structures of pre-capitalist employment. For the longest period of the 19th century we have the absolute dominance of the exchange model, then the political reaction in the form of the welfare state and eventually the attack of the new right against the welfare state that has been strengthened by the recent emergence of the phenomenon of globalisation.

Especially in view of this last trend many have decided that the nation state and with it the welfare state belong to the past. However, I hold the view that such an assertion apart from involving an oversimplification is beside the point. The point here is that traditionally we have two opposing rationalities as to the nature of employment, rationalities that under different guises appear as competing paradigms throughout modernity. This brings us back to the opposition between the Lockean and the Hegelian State. Eventually the determination of employment in modernity depends on whether property is a natural right or whether it exists from the moment of its institutional recognition. In a sense we can say that the opposition between the two paradigms is based on exactly this seemingly small but apparently essential detail. As we have shown and as a prominent neo-liberal has conceded if we accept property as pre-institutional then we cannot impose limitations upon its practice since no power as derivative of it can in a legitimate way condition it. Property is absolute. However, if we accept that property depends on its institutional recognition then as a derivative category it has to be practiced for the benefit of the superior principle that legitimises it, i.e. the state⁶⁰. In this respect it is no accident that liberalism bases the legitimisation of property on an inherent relation to labour whereas the welfare state disregards the role of labour and legitimises property on the free common will. The interpretations for this paradox are many and do not fit in the confines of this thesis. The only thing we could stress here is the paradoxical treatment of labour. Its most vehement corroboration ensues in its denial and the disregard for its constitutive role ensues in its social protection!

What we mean by this is that the opposition between the welfare state and liberalism in what concerns employment is not a contingent historical phenomenon that has ended with the crisis of the welfare state, the emergence of neo-liberalism and the emergence of the 'global market'. On the contrary as long as we live in a society

⁶⁰ C. Fried (1984) p. 1012.

that eventually derives its legitimacy in one way or another from the labouring act the opposition will persist. In this respect Locke and much more so the early political economists on the one hand and Hegel on the other, neo-liberalism and welfarism, express two social ideal types that are in opposition with each other within capitalism. As such one model may at times be predominant and the other recessive. In this strange dialectic this is the last thing that matters. The opposition will change forms, will change power positions but as such it will persist. Maybe the welfare state is an antiquated formation that has been overcome by globalisation. Maybe liberalism and the notion of catallaxy have seemingly triumphed. However, what this analysis has shown is that the opposition will return in another form, from another social space since the issue of the recognition of property will forever be contested as long as capitalism persists.

With this we bring an end to the enquiry into the main ideological perceptions of employment. From thereon we move into the inquiry as to the how these competing paradigms take shape in its actual practice as a social relation.

CHAPTER FOUR

ORGANISATION AND EMPLOYMENT IN MODERNITY

Introduction

In the previous three chapters we dealt with labour and employment first in their phenomenological-social dimension and then in their location in the philosophy of the market and then by the welfare state. In the first chapter we discussed labour as a form of human action that as a fundamental human trait is one of the most basic expressions of human creativity. The phenomenological reading points away from a perception of labour as a relation of exchange and towards a dialectical relation with property that is expressed at a number of levels and bears within it the basic elements of a political relation. In the second and third chapters and building on the phenomenological analysis of labour, we focused on the predominant perceptions of employment in modernity namely, that of the free market and of the welfare state. In this respect we saw the perceptions of the two basic ideal types as they oppose each other. We saw the catallactic model as representing the economic-property side of employment to the detriment of its social dimension. Under the logic of the market, labour is divested of all that is constitutively human about it and becomes an external, economically determined object. We rejected the catallactic model as it involved the reduction of labour to a commodity and the perception of employment as a relation of free exchange of commodities, reduction that produce morally unjust results. However, the reason that we dealt with it is that it provides the paradigmatic form of understanding of labour and employment in capitalism. In a sense we could say that the catallactic model proffers capitalism with its legitimating ideology. On the other hand we reviewed the welfare state as an effort that mitigated the extreme social results that the catallactic model produced. In this respect we saw the two models not as opposing social realities but rather as the two basic ideal types, the basic two ideologies that in a competing fashion determine the content of employment in modernity.

In this chapter we will we will look at the actual practices of employment in modernity. Our aim is to show how the ambiguities and tensions that we have described are expressed in -and give the concrete content of- employment in modernity. In this respect we are going to see these tensions of employment as they occur within an institutionally determined setting within the context that the rationality of the market, the state and the social interests of labour dictate.

We will focus our enquiry on the relations of employment as they are developed in the *modern corporation*. The reason for this is that the multifariousness of the practice of employment in modernity is unveiled in all its complexity in the function of corporate work systems. This is so mainly for two reasons. The first reason is that large corporate structures represent a very significant proportion of the total employment in society. The second and most important is that in corporate structures the interests, rationalities and practices that are formative of the character and function of employment in modernity are deployed in a clear and distinct form. By this we mean that in corporate structures we can see the conflicts but also the relations of interdependence as they develop embedded in the practice of employment.

For this reason our analysis will start from a brief exposition of the modern corporate phenomenon especially in what concerns the features that determine the relations of employment developed in it, i.e., its 'work system'. We will not deal with the modern corporation in its detail since such an attempt evades the scope of this thesis. We will deal with those of its aspects that are both determinant and indicative of the character and the structure of employment relations in modernity. For this reason we will focus especially on the interests and actors that exist within the corporation. The basic categories of corporate actors that we will talk about are property rights holders (shareholders), management and labour. We will see how the basic tensions of employment are expressed within the corporate structure in the interaction of distinct categories of actors with conflicting interests, with competing rationalities of action and who nonetheless have to cooperate under the imperative of the performance of given tasks. Next we will deal with the basic paradigms of the understanding of the corporation and see how they respectively perceive these tensions of employment relations. On the one hand we have the neo-liberal approach that perceives the corporation as a nexus of individual contracts and on the other the 'institutional' paradigm that perceives the corporation as a unit that integrates the different interests that exist in it. What is of most interest to us here is how these

different paradigms express different approaches towards labour. On the one hand the contractual model as it is inspired by neo-liberal theory perceives labour as external to the corporation that as such has no legitimate interest in it apart from the rights it receives through the contract of employment. On the contrary the institutional model despite its weaknesses integrates labour and perceives employment as an integrated aspect of the corporation. This has as a result the recognition of the rights of labour in the corporation as legitimate, a condition that despite its limitations empowers it as against its economic determination by property. In this respect we will deal first with the institution of collective bargaining as it provides the exemplary paradigm for the conduct of conflict under conditions of interdependence. We will see collective bargaining as the founding institution of 'private government regimes' and we will analyse the principles these systems are built upon. What we will try and show is how 'governance regimes' eventually become political forums for the resolution of disputes that stem from the power relation between property and labour and provide a form of accommodation of the tensions that arise through employment and allows them to be productive in an important sense.

The aim of this analysis is to capture the employment relationship in its complexity on every social level in which it appears, whether this is the interactional, the institutional or the societal level. What we will try to demonstrate in this chapter is the complexity and the multidimensionality of employment as it actually takes place in the corporation in the form of social praxis. It is exactly this form of social praxis that unveils the substance of employment in late capitalism as a dialectical relation of conflict and interdependence that can be at best accommodated but never transcended as such within capitalism. And this with the final aim to understand employment in late capitalism by shifting our understanding of it from a relation of economic exchange to one that can actually recognise its inherent ambiguities as a multidimensional political relation of domination.

1. The Modern Corporate Structure

1.1 'Unitas Multiplex'

We have already said that the focus of our enquiry is not the corporate structure per se but rather the relations of employment that are developed in it. However, any

attempt of analysis of corporate employment relations would be groundless and incomplete unless some features of the corporation that are determinant of employment are not addressed first.

The paradigmatic form of corporate order that we are going to address here is that of the commercial firm. Its analysis will provide us with as clear an insight as possible into the ambiguities of modern employment relations. In the commercial firm the conflict between the market and the social determination of labour is clearly demarcated since in it the interests and rationalities of property and labour have to coexist and moreover to cooperate in a dialectical relation of interdependence and conflict. In this sense a commercial firm is quite different from a public service or an educational institution. The latter even where it may have adopted a bureaucratic structure and accepted economic rationality as the basis of their operations and subsumed employment relations under the logic of the economic discourse its primary aim is nonetheless not economic but social, educational, etc. On the contrary the firm as the par excellence producer of wealth, as the par excellence representative of the economic dimension of the employment relation, provides us with the ideal paradigm for the understanding of paradoxes of labour as they stem from its ambivalent nature.

Our starting point is that the corporation must be seen as an integrated system that is characterised by the coordination of action that takes place within it. However this action is subsumed under a form that allows the corporation to accommodate a series of incompatible at first sight distinctions that determine it as a system of organised action that operates under premises that are defined by the ambivalent character of the relation between property and labour.

The basic distinction that will allow us to observe this complexity unfold is the legal distinction between contract and organisation in so far as it applies to corporate employment relations. We can see the modern corporate phenomenon is a mixture of market oriented and associational phenomena. We will use the distinction in order to bring to the fore the contradictory premises, under which employment is perceived in the corporation. Our starting argument in this respect is that we cannot really see the corporation as being exclusively contractual or exclusively organisational. On the contrary both these forms exist within it and have distinct yet sometimes incompatible spheres of competence.

Our starting point is that these two dimensions of the corporation cooperate while at the same time represent two completely different 'systemic identities', that in

return represent two competing paradigms in what concerns their approach to employment relations.

Our distinction resembles that introduced by Teubner¹. According to Teubner, *'contract serves to formalise the process of exchange which organises the economic reproduction of the economic system - that is the reproduction of acts of payment by acts of payment. Organisations, on the other hand, formalise co-operation as a third basic form of social action... They, too, are autopoietic systems, the elements of which comprise not payments but decisions... At the same time, they use their self-organised structures in order to specify expectations which guarantee that within the system every action can be treated as a decision'*².

Following Teubner's rationale, the corporate employment 'system' must be seen as a relational 'system' that is largely determined by two different forms, orientations and logics of action. On the one hand we have the enterprise that represents the economic orientation of the firm. The enterprise is based on actions that are oriented in their basic structure towards competition and exchange³. The enterprise communicates with its external environment, namely the free exchange market, through the legal regulation of its transactions through contract. The conceptual link between contract and the enterprise is expressed in the assertion by Teubner that contractualist approaches proceed on the assumption that competition and exchange are the normal conditions of human action⁴. Therefore, the enterprise finds in contract a tool that can accommodate its basic orientation of action. In this respect we should see the enterprise as a system that is economically oriented, determined by the economic discourse and that legally mediates its actions through contract.

On the other hand the organisation comprises the actions, communications and structures that are internally oriented and has as its main focus the co-ordination of these actions, communications, interests and goals. The organisation as we have seen operates on the basis of decisions. These decisions have as their main goal that the operations of the corporation function at their maximum rate of efficiency and are not constrained by indeterminacy and conflict. Whilst the enterprise is based on action oriented towards competition and exchange, the organisation is based on action

¹ Teubner (1993a) pp.123-158

² Ibid. pp.133-134

³ For exchange, competition and co-operation as basic types of human action see Luhmann (1995) ch.9 section 6.

⁴ Teubner (1993a) p. 129

oriented towards co-operation. It is apparent that the organisation operates under different principles than the enterprise. Its actions are oriented not towards the market but towards the corporation with the view of cooperatively co-ordinating action with the aim of attaining mutually accepted goals. In this respect we can say that one of the main, if not the most important, tasks of the organisation is the co-ordination of its 'work system' in which the concept of membership also plays a key role, so that the latter, that encompasses inherently conflictual elements, does not unbalance the corporate structure.

The distinction between the external (enterprise) and the internal (organisation) operational orientation of the corporation delineates the fundamental analytical schema under which employment relations in the corporation can be perceived. The point to be made at this stage is that the different orientation of these two logics of action introduces the interface of two distinct rationalities to the main 'system' of the corporation. As we are going to see these two simultaneously existing rationalities whilst complementary may cause indeterminacy and may become a fundamental source of and conflict within it. This is so, since as we are going to see these two logics by default can never adequately delimit the field of their application in the sense that there will always be cases where their respective rationalities and spheres of application of competence will overlap.

1.2. The corporation as an economic actor -The enterprise

As economic actors firms direct their activity towards the market. The corporation as enterprise belongs to the economic system of society. The enterprise in other words is the expression of the firm as an economic actor. For example according to R. H. Coase the firm should be seen inseparably from market, even the more so as a creation of the free market structure. Under this perspective not only the individual firm but moreover the generalised system of firms that provide the basis for the operation of the free market, should be seen as associations of economic actors that cooperate with the aim of reducing the costs and risks that economic transactions entail⁵. The firm therefore in its essence is economic and its actions are solely economically oriented. As we have seen in chapter two, action in the market by

⁵ See R. H. Coase (1988)

definition precludes value considerations as determinant factors of action unless they ultimately serve or justify an economic purpose. This means that the firm as a partnership of individual capital holders develops formal, antagonistic market relations of externality with its environment, which in this case comprises whoever does not belong to this association of capital holders namely, the shareholders⁶. This of course includes employment relations, since employees do not belong in this association. The contract of employment as we have seen considers the employee as a seller of labour power; and as a seller to the firm s/he is no different to any other provider of goods or services to the corporation. It is therefore natural that the employee under this schema remains external to the corporation.

The point that we will argue next is that the distinction between the enterprise and the organisation should be seen under the perspective of the notion of the functional primacy⁷ of the economic system in modernity. Under the perspective of the enterprise the organisation has the task of coordinating the economically oriented actions of the former. In this sense the organisation is seen as an arrangement of economic forces that has the aim of attaining their maximum economic efficiency. According to the rationality of the enterprise all actions, communications and relations of the corporation should be processed and moreover decided on the basis of economic rationality. In other words according to its self-perception the enterprise is the primary system of the corporation whereas the organisation is a secondary, supportive system. However, some aspects of the function of the corporation cannot be successfully grasped and handled by the rationality of the enterprise. These aspects especially have to do with the social dimension of the corporation. In our view this definitely includes the employment relations in the corporation. We have seen that the human-social character of labour is in sharp antithesis with its economic determination as a calculable factor of production. As we have seen in the previous chapters the economic discourse cannot perceive the complexity of this problem that is constantly present in the function of the corporation, as it cannot be quantified in economic terms. In other words as long as employment relations in the corporation are perceived solely as economic the social character of labour will be ignored in the

⁶ For the historical evolution of this idea and not the way it has been surpassed by the development of the modern large-scale corporation see Ireland (1999) especially pp. 38-41.

⁷ Luhmann in explaining the functional primacy of the economic system in capitalism connects it to the functional primacy of other social subsystems in the course of history. '*Functional primacy appears to fall to the subsystem that can be structured as differentiated from the rest of society with a higher degree of its own.*' Luhmann (1982) pp.223-224.

sense that its demands will be met only to the extent that can be economically reduced and found compatible with the strategies for the attainment of the economic goals of the enterprise, or silenced if they cannot be economically justified at all. In this respect the economic discourse provides a very poor rule of decision for the handling of the ambiguities and tensions that the employment introduces to the corporation. This brings us back to a point that we have raised in chapter two. The ambivalent condition that is created by the coexistence of the social and the economic determination of labour can become insolubly problematic due to the rationality of the economic discursive genre. As we have seen, in capitalism the economic system that is constructed around the market becomes determinant of the social structure. In this sense we do not have just a case of functional primacy of the economic system but rather a case of belief in the absolute validity of its doctrinal creed.

Therefore what we need is an approach that accepts the complexity of employment as a reality to be dealt with rather as a fallacy to be dispensed with. This brings us to the organisational system.

1.3. The Corporation as an organisation

As we have already seen from the point of view of the enterprise the primary task⁸ of the organisation is the coordination of action so that it can make possible the attainment of the economic goals that it itself has set. The first dimension of this organisational task is that of the technical coordination of actions through the internal division of labour. Although this may at first seem straightforward and simple, it is not.

Through employment a whole different dimension of the corporation comes into existence. The relations of employment in the corporation 'transform' it from a one-dimensional economic association, as the economic discourse would have it, to a complex set of relations of conflict and interdependence. The crucial factor is that labour is contradictory in its economic perception. By this we reiterate the fundamental ambivalence of labour. Labour on the one hand as crucially is of absolutely necessary for the function of capitalism. On the other hand it is a cost of the capitalist production that has to be reduced to its absolute minimum. In other

⁸ Other organisational tasks could be considered the handling of the relations of the corporation with its social environment in the form of other social, environmental and public demands upon it. In other words with issues that do not have to do with economic transactions.

words as we have seen in chapter one on the one hand we have a relation of conflict over the distribution of resources produced by labour and on the other the mutual interdependence of the parties whose cooperation is an absolute prerequisite for the attainment of their respective diverging goals.

This means that the aim of the corporation with regard to labour is to obtain the highest possible productivity from it at the lowest possible cost. It is to this end that the organisation contributes. As we have seen the rationality of labour is not originally economic; therefore the interests that employees pursue derive from social needs and desires and as such cannot always be compatible with the interests of the enterprise. Under this perspective and in order for the organisational point of view of the corporation to be perceived in all its complexity the corporation should be understood simultaneously as a locus of conflict and as a field of compromise where different interests, values and discourses as expressed by different actors, meet and interact. These interests, values and discourses are not necessarily compatible with each other and their coordination towards the attainment of a single goal not always attainable. In this respect the organisation becomes an extremely complex system that has the delicate task of accommodating them and making them compatible with the function of the corporation. In other words the organisation in order to coordinate action first has to internalise and in a sense neutralise the damaging potential of the conflict between capital and labour within the corporation.

What we are going to attempt next is a brief structural analysis of the organisation that will allow us to proceed to its perception of employment.

1.3.1. The corporation as a system of organised action. Bureaucracy

What our analysis has shown so far is that it would be an analytical mistake to perceive the corporation only in its dimension as an economic actor. As we saw economic action at this level presupposes the coordination of the actions of multiple individuals, which is something that in its turn presupposes the existence of a form of a division of labour that is rationally developed according to a certain organisational arrangement. This arrangement has to accommodate the fact that employment relations in capitalism are characterised by the presence of the authority of the one part who has the right to determine and guide the actions of the other.

According to Weber the apparatus through which rational authority as existing in capitalism, operated and exercised itself in the field of social and economic organisations, is bureaucracy⁹. By getting an insight into bureaucratic organisation we can get an insight in the organisational structure of the corporation. For Weber, bureaucracy should be approached as a product of the rationalisation of society. It is a strictly goal oriented system which like the capitalist economy, operates on the basis of instrumental-formal rationality. For Weber, bureaucracy prevailed due to its superior rationality, in the sense of its superior ability to any other form of organisation that existed up to then to achieve predetermined goals on the basis of the ends-means schema. This means that these goals are rationally selected and rationally pursued. We could say that it is the rational operation of bureaucracy as a system that differentiates it from all the other forms of administration that have existed in various periods of history. In other words bureaucratically structured organisations according to the Weberian ideal type should *prima facie* preclude from their operative system any consideration or any method that cannot be formally-rationally calculated, evaluated and pursued with strict methodological diligence. Rationalisation is the crucial element that has enabled bureaucratic organisations to be so successful in achieving their goals.

The most significant effect of the adoption of the bureaucratic rationality by corporations is that they enable themselves to cope to a much more efficient degree of with the contingencies of the free- market. Additionally another most important factor is that through bureaucracy they create organisational structures that allow them to rationally organise their internal structure as well. In other words the bureaucratically structured organisation mainly aims at the attainment of a basic equilibrium of all the contributions involved in corporate action so that the latter can continue to exist as such.

In summary we could say that we have a case of a structural dichotomy within the corporation. A dichotomy that stems from the fact that the corporation has to act and to adapt both to its external environment (namely the market) but also towards its internal structure, a structure that in the last instance guarantees its survival and its reproduction as a system. Under this perspective we can delimit the corporation in its dimension as an enterprise and in its dimension as an organisational system. Our

⁹ For Weber's analysis of bureaucracy see Weber (1978) pp. 956-1002.

position as it will be developed in this chapter is that the dichotomy of action between the internal and external is a fundamental problem that underlies the corporate structure. What our claim will be is that this dual orientation of action determines the character of the corporation as both an economic actor and as a normative system.

1.3.2. Organisation and authority-hierarchy

We have seen so far the duality in the rationality of the corporation by delimiting the two basic logics of action in it. We have also seen that in the organisation itself we have a case of double rationality since on the one hand we have tasks that are pursued according to the needs of the enterprise but also issues that have to be dealt with on the basis of its integrating function.

We will continue our analysis on the system of the organisation by trying to demonstrate its characteristics as an organised normative order with its basic characteristic being its hierarchical structure.

Our first observation is that the organisation of the firm is structured around a strict hierarchical schema that is based on the authority of one part (employer) over the others (employees). This authority stems from the power of property in capitalism to put labour in action for its own purposes. However, and as we are going to see further in this chapter, the complex structure of the modern corporation presupposes relations of authority and power far more subtle than this relation suggests, although this is the basic schema that provides them with their legitimation.

We have said that hierarchy is a fundamental feature of every bureaucratic organisation. However, as the case is with every substantial feature of modernity authority becomes rationalised and acquires the attributes that make it compatible with the general social context of modernity. In Weber's words: Rational authority is determined by the fact that *'the validity of a power of command is expressed in a system of consciously made rational rules (which may be either agreed upon or imposed from above), which meet with obedience as generally binding norms, whenever such obedience is claimed by him who the rule designates... Obedience is thus given to the norms rather than the person'*¹⁰.

Here we have a normative system of rational authority that runs through employment relations. This normative system of rules is of paramount importance for

¹⁰ Ibid. p. 954.

employment relations as it can regulate substantive issues that influence the livelihood of employees such as promotions, dismissals and discipline in the workplace. What should be stressed is that this authority is not exhausted in the interpersonal relation between an employer and an employee. It is a generalised system that runs through the whole of the relations within the corporation.

Although we have had major developments and essential transformations in the structure and the function of organisations over the last years to the extent that there is the view that the Weberian model of bureaucratic organisation has been overcome I believe that its essential characteristics remain intact. Although it is undeniable that that we have major changes in the internal structure of organisations but not in the substance of their rationality. They may be far more flexible and open to adaptive strategies so that they can assume varying roles but they remain mechanisms of organised power for the pursuit of specific interests¹¹. Moreover, hierarchy although not rigidly structured and applied as the case was in the Weberian organisational type was never contested in its essence by the new models of organisation.

The question that henceforth emerges is by what principle does this rational, hierarchically constructed internal order of authority receive its legitimacy. This brings us to the issue of the legitimating foundation of corporate authority.

1.3.3. Organisational membership

This legitimating foundation is that of membership. Membership in commercial corporations has certain characteristics that are particular to them. First of all in the commercial corporation the motives for membership are irrelevant to the goals of the corporation. This has to do more than anything else with the fact that economic action is individualised in the sense that the actor despite his/her social contribution has no purpose and is not motivated by a desire to serve wider social interests. Additionally, in the corporation in contrast to other forms of institutionalised action, action is not primarily oriented towards the realisation of commonly held values¹², but rather to the attainment of goals set by partial non-generalisable interests. For example, and as we have already seen, the economic firm has as its aim profit maximisation, whereas the goal of any single employee, even if s/he is a senior manager, is individual well

¹¹ See Melucci (1996) p.251. For more see section 6.2 of this chapter.

¹² See Weber (1978) p. 902. However, as we are going to see there exists a strong political element in the corporation, introduced to it through its conflictually operating work system.

being¹³. The separation between the motive for membership and the normative consequences of membership in the first instance filters out this incompatibility and provides the organisation with a plausible ground for the legitimisation of its authority, since membership in the commercial firm is voluntary. In other words the normative justification of the corporate order rests on an act of the free will to join it and thus to accept its internal normative order. Therefore, the ideological value of membership rests on the fact that it provides a consensual justification for the normative order of the corporation.

However, although voluntary membership may legitimise the authority of the organisation, it cannot in any case induce the loyalty of members neither to its values nor to its goals as the case would be with an e.g. political organisation. Voluntary membership is not the product of an agreement on values and goals, an agreement that could induce loyalty feelings from the part of the participants, but the product of a rational compromise on the basis of the balance of competing non-generalisable interests. These interests are produced through individual but also collective real life situations and strategies of action and preserve their autonomy *vis a vis* each other in the sense of their capability to project demands on the corporation. The recognition of the validity of the corporate normative structure does not alter this fact. This is so, since this recognition is mainly established on functional-instrumental rather than value oriented criteria¹⁴. This means that whereas, one may agree on the terms of membership and accept the authority of the organisation as legitimate, for s/he may believe, that through membership s/he can promote hers/his personal goals, s/he does not have to agree on the value orientations of the actions of this authority. Moreover, s/he will react when the decisions of the organisation are detrimental to what s/he perceives as hers/his personal interests (e.g. pay cuts). Consequently, the goal to be achieved is to make commensurate individual motives of membership to the goals of the corporation. In view of the fact that individual motives, interests and goals can be in a conflicting relation as expressed in the conflict between capital and labour, membership must become the normative concept that allows mediation of the conflicting forces at play in the organisational decisions. In this respect membership is a normative filter used for the harmonisation of diverging motives of participation and

¹³ On the substantive motivation of formal economic action see Weber (1947) p.185

¹⁴ For an overview and a critique of the notion that the worker participates with a segment of its personality into the corporation see Selznick (1969) p. 271.

the stabilisation of individual patterns of behaviour on the basis of the voluntary acceptance of organisational rules¹⁵.

We can see that the organisation besides its task of determining the internal functional division of labour and of coordinating action with the aim of supporting the economic goal of the enterprise has additionally the task to achieve a compromise between the aforementioned goal of the enterprise and the various interests and goals that are invested in the corporation. In other words the organisation must be seen as a system that has the task of integrating the corporation into a coherent unit of action.

1.4. The relation between organisation and enterprise-A summary

We see that the organisation has different goals to achieve and different tasks to perform than the enterprise. The corporation as an enterprise guides its operation towards the market where the 'basic unit' is the financial transaction. The legal form of the financial transaction is the contract of exchange. On the contrary for the organisation the basic unit is the rationally concluded decision¹⁶. The organisation has become an autonomous system of action that reproduces itself *'through the recursive linkage of organisational decisions'*¹⁷.

In this respect we can now say that the organisation and the enterprise as two functionally differentiated, logics of action that operate on the basis of distinct and quite often diverging, rationalities. Following the logic of general systems theory one could designate the 'enterprise' and the organisation as subsystems of the corporation. The relation between part/whole is designated by Luhmann in terms of the system subsystem distinction where the latter are differentiated out in terms of a unique function that they perform for the system. While function tracks the relationship between whole and parts, performance tracks that between parts. Our discussion of the distinct rationalities of the enterprise and the organisation was an attempt to discuss their respective functions. In terms of their relationship to one another, Luhmann would designate their mutual externality in terms of 'internal

¹⁵ On the issue of membership as the basis of organisations see Luhmann (1982) p. 75.

¹⁶ See Teubner (1993a) p. 130.

¹⁷ Ibid. 134.

environments', each of them providing in its own terms the rationale of the corporation¹⁸.

We have delimited the two main logics of action in the corporation and we have, albeit with a very general description, outlined their respective functions. In this respect we can say that they function in a complementary way in reference to the main system of the corporation. However, the complementarity of their function and the positive contribution of their performance to the corporation can be endangered in a multitude of situations, particularly when they both stake a claim as to the prevalence of their operative rationality over the same situation. I consider that the fact that information can be processed from both the economical and the organisational point of view and that both systems can lay an internally legitimate claim upon the handling of a situation can in some cases create conflict situations. This may be so, to the extent that the stakes that they pursue can be diverging and in some cases even incompatible.

At this point an important issue should be clarified. When we talk about two basic subsystems we do not talk about departments with distinct sphere of competence as determined by the internal division of labour of the corporation, although sometimes due to the organisational division of labour they may appear to be so. The distinction between the enterprise and the organisation is not an inter-departmental feud between production and administration. On the contrary the distinction applies to orientations of action towards what the systems perceive as their environment. Moreover it concerns the processing of information according to different functional goals and on the basis of different discursive stakes. In this respect we do not talk about enterprise actions and organisational decisions but of decisions and actions that are simultaneously both organisationally and economically processed. In other words action in the corporation comprises of events that often have a double discursive meaning.

Of interest to this thesis is to see how the corporate structure which 'suffers' from the presence of this dual rationality, handles the challenges that are produced from the claims of the dynamics of employment relations. This is the more so since this recurrent incompatibility may be the source of tensions and frictions in respect with employment. The focus of our inquiry will be on the how the organisation and

¹⁸ See Luhmann (1990) pp. 73 -78. For the concepts of internal differentiation and internal environment see also Luhmann (1995) p. 18 and 189-194.

the enterprise deal with the question of labour and on how their respective rationalities perceive in different and quite often, conflicting ways the role and the status of labour within the corporation.

On the one hand we have the rationality of the enterprise that perceives all its relations as market transactions with its external environment. In this respect for the enterprise employment relations are market relations of externality. Labour is not integrated in the corporation as the latter is seen as an association of property holders. On the other hand the organisation focuses in the internal structure of the corporation with the aim of ensuring the stabilisation and the safe reproduction of its function. In this respect all relations that affect not only productivity but also the stability of the corporate structure are perceived as internal relations that have to coexist within an integrated coherent unit. In other words whereas the enterprise externalises labour the organisation integrates it.

This dual rationality, namely on the one hand the orientation towards the market on the basis of economic action and on the other the co-ordination of motives and interests on the basis of decisions, create the need for a system of mediation between them, so that friction and indeterminacy may be reduced.

And this pertinent here as employment relations are the major source of controversy between the enterprise and the organisation. Our main concern will be to explore the social and legal validity of this system of mediation that takes the form of a private government regime. Our point is that we should see private government as a system that has to give plausible solutions to the problems that our analysis so far has posed. At this point we will turn from system to action perspective as the latter will allow us better to explore the complexity of governance as defined by the interests and rationalities that are at play in the corporate system. This is so since primarily governance is a system of legal mediation of these interests and is hence determined by the relations that their interaction in the corporation creates.

Therefore since private government is a system that tries to accommodate these diverging interests the corporate actors, a presentation of them would illuminate the task.

2. *Interests and Actors in the Corporation*

The purpose of this section is to show the actors in the corporation and identify their respective interests and rationalities of action. This will allow us to unveil the corporation both as an economic actor and as an organisation from an action perspective. The purpose of this analysis is to reveal the corporation as a locus where diverging interests and rationalities as produced through employment converge and interact within a constantly negotiated normative framework.

It should be stressed that the identification of actors and interests outlined in this section by no way provides an exhaustive catalogue. Interests are in a '*strict sense socially constructed, that is to say constituted only by social communication*'¹⁹. This means that we are not seeking analytical elements in an immutable idealised structure but rather forces, practices and relations that as socially constructed are constantly evolving. What our analysis will try to demonstrate is that the modern corporation is a system of organised power constructed around the interplay of the key concepts of property, economic and technical knowledge and finally and most importantly labour and how the fundamental ambiguities and tensions of employment are played out in this context.

2.1. *Shareholders and the right of property on the corporation*

As we have seen in the previous section, under the conception of liberal political economy the firm is seen as an economic actor that is established by individuals in their capacity as economic actors who collaborate with the aim of best pursuing their self-interest. This means that the firm comes to existence with the sole purpose of promoting the interests of the shareholders. The understanding that bases the corporation on property rights is strongly favoured by neo-liberal economics and in the legal discourse by the contractual nexus theory²⁰. For example M. Friedman states that the only responsibility of business is to increase its profits (i.e. the short or long-term interests of the shareholders) whereas all other interests that invested in the

¹⁹ Teubner (1994) p. 33

²⁰ See below

corporation are irrelevant as they depend exclusively in its economic success²¹. However this approach that in a sense can be considered as the legitimising theory of capitalism has been surpassed by the selfsame development of capitalism itself. This first of all has to do with the transformation of the classical or entrepreneurial firm (with the individual entrepreneur-capitalist being the prominent figure in it) into a complex, subtle and in a sense de-individualised structure²².

This de-individualisation of property first of all has to do with the increasing size of the corporation that had as a result the dispersion of property rights to an unidentifiable number of physical and legal persons. As such shareholders have become external to the corporation in the sense that they do not operate actively but rather nominally in its operation²³. The second reason has to do with the legal development of the concept of property in the corporation, a condition that the increased size and complexity of the modern corporation brought about. The classical legal perception of property right as a right of a physical person over an object or a title to a legal right can no longer describe the relation of the shareholder to the corporation²⁴. The shareholders have become traders of titles to revenues to companies that they now very little or even nothing about, rentiers to shares the value of which is often independent of the 'property right' that is enshrined in them²⁵. In other words shareholders no longer have a right of ownership over the company but rather a right to the income that the company produces. It is this that is exchanged in the stock market and not property rights. In other words we can say that the share does not represent property but rather the exchange value of the prospect of the income of the company. This means that first of all the figure of the individual stockholder as the proprietor of a company becomes less and less distinguishable in the modern corporate reality.

On another level the nature of the share and its dispersed character creates a divergence of interests between shareholders as a group. For example a part of the shareholders may have an interest in the liquidation of the company whereas another

²¹ See M. Friedman (1977) pp.168-174.

²² See amongst others J. K Galbraith (1967) especially chapters one to eight.

²³ See Galbraith (1967) chapter eight.

²⁴ The individual property right holder that Locke developed has immensely changed in the last two centuries of capitalist development. The irony of the fact is that all neo-liberal theories of property under different guises still refer to the Lockean abstraction in order to find a legitimating theory that could plausibly support that property is a concept that despite its references to labour should be developed according to its own logic.

²⁵ See Ireland (1999) pp.41-47 and Ireland (2003) pp. 259-264.

may have an interest in the continuation of its operations. The aim of profit maximisation that supposedly is pursued collectively by the shareholders is not a unifying principle of action in the era of speculative capitalism.

Our last remark has to do with the ever-increasing size and complexity of the modern economy. This had as a result the demand of knowledge and skills from the part of the corporation in order to be able to survive the increased complexity and intensity of the market game. As a result, the entrepreneurial talent that was the driving force of the classical corporation was inadequate in itself to meet the demands of the new reality. This development of capitalist economy and consequently of the modern corporation brought about and made prominent a new caste of experts that became indispensable for the workings of modern corporations; management, or in J. K. Galbraith's terms, the technostructure²⁶. The special knowledge and skills necessary for the function of the corporation in addition to the dispersion of property rights holders has gradually made managers the actual makers of corporate policies. It is exactly the function and rationality of management that we are going to examine next.

2.2. Management and managerialism

We have said above that in the modern corporate structure employment becomes a tripartite relation between property labour and knowledge. It is the role of knowledge that takes the form of scientific management and the role that it plays in the formation of the employment relation²⁷.

From all the aspects of the managerial phenomenon what is of interest to this thesis is first of all the emergence of management as distinct a layer of authority within the hierarchy of the corporation, an authority that was the eventual outcome of the development that has been termed as the separation of ownership and control²⁸. Managerialism as the rationality of management will particularly occupy us here, both in its dimension as a legitimating ideology for the function of management but even the more so in its pretension to be the application in social practice of the classical

²⁶ For the term technostructure see J. K. Galbraith (1967) chapter six.

²⁷ For a general overview see Thompson & McHugh (1995) pp. 27-58

²⁸ For the term see Berle and Gardiner (1991). For an overview of the development see Galbraith (1967). For a more detailed analysis of the development of large-scale corporations, see Edwards (1979).

project of modernity that perceived rationality as the fundamental principle of social organisation.

2.2.1. The role and the interests of managers

As we have already said the functional significance of managers in the corporation rests in the general acknowledgement of their status as experts. Managers occupy their positions by virtue of their knowledge of a specific and demanding role that is assigned to them. As such the role presupposes knowledge of the scientific substratum of the task. Moreover the performance of the duties of a manager whether technical-scientific, economic or organisational will more often than not demand the coordination from his/her part of the actions of individual workers.

In other words we can identify managers as the persons who direct according to a specific corpus of knowledge the actions of workers with the aim of the optimum attainment of corporate goals.

However, the external characteristics attached to managers such as control over their work, carrying out the task of planning for the enterprise, supervision over the work of employees etc.²⁹, are insufficient in themselves to provide us with a satisfactory criterion for the understanding of management. Structural as well as functional attributes of management have to be analysed in order for this to be attained. We have stressed the importance of the rationality appertaining to the role, but before venturing to its analysis, there is another fundamental dimension, determining the notion of management. That is the identification and nature of management role and interests in the corporation as distinct from those of property and labour.

The answer lies in the hierarchical system of the corporation under the perspective of which, we can see management as functionaries of a certain rationality that is indispensable to the workings of corporations.

The key to the understanding of management lies in their relation to knowledge. In this relation also rests the legitimation of their authority within the corporation. Under the organisational logic this authority is not delegated contractually, but rather is legitimated on the basis of knowledge. It is this autonomy that made I. Macneil to

²⁹ For example, see Watson (1995) p. 308.

succinctly characterise managers as '*agents without principals*'³⁰ since in reality they do not act in their own name but neither in the name of someone else. These attributes of management are the decisive factor that has led to the assumption of the control of the corporation by them. As we have said ownership and control are separated in the modern corporation. The term describes the fact that the structural limitations that the complexity that modern corporations imposed on the ability of shareholders to manage the corporation, has shifted the control of its operation to management. Managers due to the identification of their interest with that of the shareholders and due to the economic rationality of their role can represent the corporation both enjoying the trust of the shareholders while at the same time being independent of them.

In this respect we can say that we have a strategic alliance between these two distinct interest groups management and the shareholders. On another level this alliance can be seen as an alliance between all too powerful social forces that in a sense provide the basis for the legitimation of the capitalist system, namely those of property and knowledge.

However, I believe that the cognitive horizon for the understanding of the issue of management extends far beyond the limits that the notion of the corporate structure has set. On the contrary, I believe that the role and status of managers cannot be comprehended unless we understand the 'culture' of managerialism, in its functional-instrumental and ideological dimensions. Therefore, we need an altogether new approach that will unify the seemingly incoherent functional attributes of the notion of management. For this to be achieved we need a comprehensive view on management so that it can be revealed in all its implications, both on the corporate micro level and on the social macro level as well.

2.2.2. The rationality of managerialism. Managerialism and Economics as a Science

I consider that we should seek the key characteristics of management in their relation to the economic goal of the enterprise. Even when their role is 'organisational' rather than 'economic-productive' the rationality of their role to their

³⁰ I Macneil (1979) p. 78.

task is economic, in the sense, that their performance will in all cases be quantified and assessed in economic terms.

In my opinion their affiliation to the rationality of the economic-technical discourse is the decisive factor that determines management. Under this perspective management should be seen as the product of the increasing complexity of economic action and of the all-embracing tendency of economic rationality in capitalism.

On a first level we saw that management emerged when the intricacies of the operation of a commercial corporation became too complex for any single entrepreneur to handle. On another level we are going to argue that managerialism is a product of the social predominance of formal-instrumental logic and of economic action as the socially predominant form of action. As such, management as a concept, as a principle and as a social force can only be perceived in conjunction to the rise of the capitalist economy. Moreover, management in all the above outlined dimensions is inextricably linked to the main proposition that was developed by many thinkers of the enlightenment namely that, reason should guide human action.

Although the enlightenment of the individual was undoubtedly a most important period for humanity, a period that liberated humanity from ignorance and prejudice demonstrating the capacity of the free acting person to create and maintain on the basis of reason the social world s/he inhabits the application of some of main propositions had some considerable side effects. Under this perspective social action became something that should be calculated and measured according to the principles of reason (as they were expressed by the method of either the mathematics or of the physical sciences as they were perceived before their differentiation at the time)³¹. Consequently reason in the above mentioned sense, should guide one of one of the most fundamental dimensions of social action that is, economic action. What we are going to argue next is that this principle gave the ground for the development of managerialism.

It would be interesting to mention a fundamental inconsistency of the neo-liberal thought at this point. For neo-liberals the superiority of market society lies in the ability of the market order to stabilise expectations through the adaptation of action to its ever-fluctuating function³². The market is supposed to be under this paradigm unpredictable and contingent in its fluctuations. This is a condition that stems from

³¹ Again see Cassirer (1979).

³² See chapter 3. Hayek (1944), (1960) etc.

the fundamental limitations of the capabilities of human cognitive capacity. In this respect the need for the cognitive-technical manipulation of the otherwise unpredictable function of the market that management provides seems to be redundant. As we have seen the pure version of the libertarian model attributes everything to the individual economic actor that has the ability to adapt its action to the demands of the market. Nonetheless, as we are going to show the role of management although largely ignored by neo-liberalism plays a most fundamental role in the 'naturalisation' of the market order. Managerialism is in a sense the practical version of the neo-liberal assertion that a market society guided by economic rationality is in the last instance the natural order of things.

The emergence of economics as a discipline with a claim to scientific truth has been analysed extensively by many political philosophers and has sparked a productive political and philosophical debate over the last decades. The subject is not relevant to this project in all its width. However as it presents aspects that are of direct relevance to this thesis an analysis of them can be extremely fruitful.

The point to be made here, following the tradition that has been built upon the critique of the Critical School of Philosophy, will be that economic rationality in its connection to the technical instrumental discourse of modernity has the tendency to impose its claims as norms upon social discourses that originally are not dependant on systems of organised power, thus frustrating their norm producing capacity³³. Our final aim is to see how such an approach finds its application in the employment relations of the corporation.

According to the modern tradition that ascribes to reason a cognitive-instrumental the prominence of the natural sciences as the par excellence cognitive genre operates on the basis of formal logical axioms that translates to a notion of reason that can stake a valid claim to the truth of the world. The world for the enlightenment is predominantly a physical world that *is*³⁴. The human world, the world of human relations is naturalised and in this sense objectified, since nature itself has been reduced to an object for the natural sciences that from now on can technically manipulate it. However, as Husserl demonstrated the technical-scientific perception of the world, a perception that followed the logic of mathematical thinking

³³ See especially the notion of colonisation of the lifeworld as developed by Habermas (1987) pp. 332-373

³⁴ Ibid. pp. 37-92

through the subsumption of phenomena under geometrical formulae, eventually imposed a superficial understanding of the world that had as a result the rejection of contemplation upon nature in favour of its technical manipulation³⁵. As Heidegger argued, the technological understanding of the world 'enframes' it in the sense that it turns it into object that is delimited by the utilitarian logic of its objective use. In this respect technology instead of being a tool in the interaction between humanity and the world, imposes an understanding of the world that transforms it from a plain of human action to an object of human domination³⁶. It is on this basis that reason thus becomes an operative principle that hypostatizes the world and reduces it to a manipulable object of domination. As Habermas has remarked *'What seems to belong to the idiosyncratic traits of Western culture is not scientific rationality as such but, its hypostatisation. This suggests a pattern of cultural and societal rationalisation that helps cognitive-instrumental rationality to achieve a one-sided dominance not only in our dealings with external nature, but also in our understanding of the world and in the communicative practice of everyday life'*³⁷.

Moreover, as H. Marcuse has remarked *'the very concept of technical reason is perhaps ideological...Technology is always a historical-social project: in it is projected what a society and its ruling interests intend to do with men and things'*³⁸. In other words the emergence of economics as science is inextricably linked to the instance that instrumental dimension of reason becomes predominant, in the sense that it guides action on the basis of the ends-means schema. It is this ends-means schema that on the basis of technology posits humanity in opposition to the world as calculable object of domination³⁹. As a result in capitalism economic action under the principles of cognitive instrumental rationality transfers this objectification of nature to the sphere of the social world that in its turn offers itself as a predictable object of human domination. It is under this perspective that the social lifeforms should be made quantifiable calculable functions of a process that is determined by economic rationality. Thus economics as a quasi-rigorous science operates on the premise of a cognitively accessible and calculably predictable world of human action. Again just like the natural sciences this world is a world where validity claims are tested against

³⁵ See Husserl (1970) p.42ff.

³⁶ See Heidegger (1993) pp.311-341

³⁷ See Habermas (1984) p. 66

³⁸ Marcuse (1968) p.223.

³⁹ See the classical analysis by Habermas in Habermas (1971) pp.81-122.

truth and where as a result the normative ought is inexorably derived from the cognitive is. The world of human relations is naturalised and becomes amenable to the manipulation of reason, a reason that as it operates on the basis of the instrumental calculability of the forms of the world, cannot comprehend the universe of human life-forms in all its diversity, since the non-quantifiable and the unpredictable forms of human relations evade it⁴⁰.

We mention this here because what we will try to demonstrate is that managerialism has a logic that represents in action exactly this scientific claim of economic action. In other words and despite the ideological reservations of neo-liberals towards managerialism as a distinct function⁴¹, we can see that they derive the validity of their discourses from the same source. The difference between managerialism and the ideological neo-liberal individualism is that the former transformed economic action from a field where entrepreneurial talent and insight had the predominant role to a field of action where a strict scientifically derived methodological diligence has to be applied. In other words managerialism transformed economic action from a craft to an applied science. What concerns us here is that through the introduction of managerialism the economic perception of labour becomes far more subtle and complicated. A whole range of terms from efficiency to productivity are now being used to describe the economic function of labour. Labour is no longer a crude object of domination by the property right holder but rather a complicated productive factor that has to be subtly manipulated in order for its use to be optimal for the economic system. The work of F. W. Taylor on the scientific management of labour paved the way to a whole new era of industrial relations that was characterised by the intensification of labour performance and maximisation of its efficiency under economic terms⁴². The important factor that needs to be stressed is that this transformation of labour relations took place under the guise of scientific principles. This means that the technical manipulation of labour, the manipulation of its creative power in favour of the capitalist economic system takes place under the aegis of a discourse that considers its findings as invulnerable to critique. In other words the relation of domination between property and labour ceases

⁴⁰ See Habermas (1984).

⁴¹ See Hayek (1982) Vol. 3 p. 82

⁴² F.W. Taylor (1947).

being a contingent power relation and is transformed to a natural fact⁴³. Managerialism projects an image of the employment relation, as it immutably should be. The demands and desires of labour inexorably succumb to the determinism of its perception as a manipulable productive factor.

Another most important change that managerialism brought about was that in the legitimation of the relation of subordination of labour to property. The legitimation of capitalist production through a technical/economic rule changed the character of the subordination of labour to property. The labourer does not obey the person of the employer s/he rather succumbs to a technical imperative that s/he cannot in any way challenge or influence⁴⁴. In other words the relation of subordination becomes rationalised as well.

What should be stressed here is that this thesis does not hold that economics produces invalid assertions. Such claim would be outrageous. However, I believe that economics as a reflective social science makes assertions that are bound within the certain cognitive horizon that is delimited by the actual practice of economic action and therefore are not scientific truths with universal validity⁴⁵.

What our analysis of property in the corporation and managerialism has shown so far is that there exists a strategic alliance between them. This alliance is not just a phenomenon based on a contingent affiliation of interests but rather a structural condition that is connected to the foundational logic of capitalism. In what concerns our enquiry this means that labour apart from being subsumed under the logic of property is also subsumed under the logic of technocracy. This of course only adds to the complexity and to the contradictory character of employment. We will see the consequences of this added complexity further in this chapter. Prior to this what needs to be addressed in order for the analysis of the interests and rationalities at play in the corporate order to be complete is to look at the role and interests of labour as an actor in the corporation.

⁴³ For a similar view see Albrow (1997) p. 41.

⁴⁴ Simmel (1978) pp. 335-336

⁴⁵ See in Teubner (2003/2004 a)

2.3. Employees and the corporation

We have seen in chapters one and two that according to the liberal notion of employment the employee, is the person who sells his/her labour power to a buyer (the employer) that has the right to use it for his/her own purposes.

However our analysis has shown that contractual definitions are not able to capture fundamental elements of the employment relation such as its heteronomous and authoritative character especially as it takes place in the hierarchical system of the corporation. As O. Kahn-Freund has observed about the contractual relation of employment:

'In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'⁴⁶.

This approach provides us with an understanding of employment that is in accordance with the reality of the corporation as a hierarchically organised system of authority. In other word the criteria of submission and subordination supplemented by the criterion of control⁴⁷ may help us identify the employee as a person that in view of the existence of a contract of employment is submitted to the system of authority that already exists in the corporation.

This helps us put the position of labour in the corporation in perspective. The labour relation is as we have seen a relation of submission and subordination something that produces conflict but we should not forget that it is also have a relation of interdependence⁴⁸. The problem is that the simultaneous pursuance of these interests cannot always be possible, since pursuing the one can jeopardise the other. Moreover, the situation becomes even more complicated since these interests are not

⁴⁶ Kahn-Freund (1983) p. 18.

⁴⁷ This happens among other things so that a distinction can be drawn between the contract of employment and the contract for the provision of services. Over the last few years this distinction has acquired increased significance, since many companies have resorted to the trick of changing the contracts of their employees to contracts for the provision of services, so that they will not have to pay social security contributions, or be bind by employment protection regulations. See for example Deakin and Morris (1995) pp. 193-194. On the effect of franchising on the 'individualisation' of work see Beck (2000) p. 54.

⁴⁸ This condition often makes the interests of labour conflicting in themselves, since the aspect of conflict is often in opposition to the aspect of interdependence. For example, labour on the one hand is in a constant demand for higher wages and better working conditions (conflictual elements) and on the other for the continuation of employment (factor that induces cooperation on the basis of interdependence).

amenable to a priori hierarchical qualifications⁴⁹. Their relative importance depends on the actual conditions of the balance of power between management and labour that determine the pursuit of actual and concrete strategies⁵⁰.

The recognition of the ambivalent approach (an ambivalence that in the last instance is an outcome of the ambivalence of the relation of employment in capitalism) of labour towards employment and the divergence of its own interests delimits a most fundamental aspect of employment in modernity⁵¹. Labour has to coordinate its ends if it is to pursue its interests as a corporate actor. According to Clauss Offe *'the optimal mix of these contradictory ends cannot be calculated by individuals but only by organisations.'*⁵² In this respect we see that the collective organisation of labour is not only a means for the aggregation of resources in its confrontation with property but also a means for the *'qualitative definition'* and *'selection'* of its legitimate interests; interests to be pursued in persistent strategies according to priorities that these strategies have set. In this respect we can see in another context the validity of the Weberian thesis that the right of labour in the free market is transformed from an individual right to the value of the product to a collective right to a socially determined standard of living. Labour interests are collective interests that pertain to a certain group of people and as such can only be collectively pursued.

This means that we have a condition of extreme complexity in respect to the issue of the interests of the corporate actors since what we have is not a tripartite divergence between solidly demarcated actors within distinct interests but rather a multiplicity of diverging interests, motivations and rationalities at play in the corporation, that although in the last instance are produced through the ambivalent nature of the relation between property and labour cannot in the last instance be put under the single schema of conflict between property and labour. The problem that emerges as most pressing at this stage is how this divergence can be accommodated within the corporate system, since a certain degree of integration is an absolute requirement for any kind functional cooperation⁵³.

⁴⁹ Offe (1985) p.249

⁵⁰ For an interesting view on labour interests on the corporation see Ghilarducci, Hawley and Williams (1997).

⁵¹ For an interesting account of the *'paradoxical interests'* of labour in the corporation see Ghilarducci, Hawley and Williams (1997)

⁵² Ibid.

⁵³ See Gorz (1989) p.33

If we want to simplify this schema we can say that employment in the corporation is a relation of extreme complexity characterised by a multiplicity of conflicting interests and rationalities as they are derived by the relation between property and labour as mediated by the role of management as a 'representative' of the importance of the role of technical knowledge in late capitalism. Our next step will be to see how this complexity is reflected in the legal theory of the corporation and especially how legal theory tried to reduce this complexity by subsuming under normative principles that reflect the legally dominant perceptions of employment.

3. The legal foundation of the corporation

Two theories can be seen as providing the two basic competing paradigms for the legal understanding of employment in the corporation. The one that we are going to review first is the contractual theory of the corporation. This theory perceives the corporation as a nexus of contractually established relations. According to this approach the work system is perceived as the sum aggregate of the individual contracts of employment that the corporation concludes with its employees. This simple and straightforward at first sight assertion, has major consequences for the legal reading of the corporate order.

The other theory is the institutional theory of the corporation. This theory perceives the corporation as an integrated system of action that is based on the cooperation of actors with the view of the attainment of a commonly accepted goal. Under this perspective employment in the corporation is seen as a cooperative relation that is based on the mutuality and community of interests of the parties involved. In this respect we can say that the contractual theory reflects the economic perception of the corporation that as we have seen externalises labour whereas the institutional, the organisational one that integrates it.

3.1. The contractual theory of the corporation

The theory of the corporation as a contractual nexus has as its basis the liberal doctrine of freedom of contract. In this sense the theory of contractual nexus is the

neo-liberal legal theory of the corporation and as such is strongly determined by economic considerations⁵⁴. In this respect and in view of our critique on neo-liberalism in chapter two the contractual theory must be seen as a paradigm that puts emphasis on the property side of the employment relation⁵⁵. The basic assertion of the contractual nexus theory is that all the relations within the corporation in the last instance are relations that derive their legitimacy by virtue of a contractual relation between the parties involved. It is the implications of this assertion that we are going to analyse.

3.1.1. The corporation as a nexus of contracts

The legal instrument, through which the enterprise conducts its external dealings in the market, is contract. According to the logic of the theory, contract as a regulating principle should be equally valid for both the external and the internal the relations of the corporation. This latter of course include corporate employment relations. However and in view of the fact that employment is much more than a market relation this approach eventually comes up against some insurmountable problems.

As we have seen in chapter one, the contract of employment legally regulates the exchange between a buyer and a seller of labour power. The first question that arises is between whom this exchange takes place in the complex corporate structure. On the one hand we have the employee, but who is the employer in the case of corporate employment relations? Without the legal figure of the employer as the buyer of labour power the idea of the free exchange of labour becomes groundless. However, the substitution of the physical person of the employer through the development of the law of legal persons by legal figments such as corporate groups (or legal formations that evade the scope of our research such as company networks, franchise agreements etc.) the identification of the employer is often a complicated task⁵⁶. What is quite interesting is the way that the contractual theory tries to get its way around this problem.

⁵⁴ For the most influential account of the theory of contractual nexus see O. Williamson (1975) and (1985). For its economic orientation see Krause (1985).

⁵⁵ For an account and critique of the 'neo-liberal' contractual theory of the corporation see Wedderburn (1985) pp.5-10. See also Parkinson (1996) pp.121-146, Ireland (2003).

⁵⁶ A. Supiot (2000) p. 323

The contractual theory in following the logic of property determination of employment considers the employer as the owner of the undertaking⁵⁷. Nonetheless, management as the 'subject' that runs the affairs of the corporation are the ones that have the power to contractually bind it, as the actual property right holders i.e. the shareholders in the vast majority of cases have no real say in the running of the corporation. However, even the most senior and highly ranked managers and directors are themselves contracted into the company. It is on the basis of this constant contractual delegation that the corporation is built. This means that every contract of employment implies a certain delegation of authority that follows the hierarchical logic of the corporate organisation. Authority according to the model is contractually delegated according to a hierarchy of positions. However, as we have seen the autonomy that managers enjoy and the control they exercise over the affairs of the corporation makes the description of the relation as one of agency as completely inappropriate.

This brings us to the perception of the legitimacy of interests in the corporation. If we accept the perception that rights within the corporation are only contractual then we accept that eventually we have a web of rights and obligations that are delegated by property. In this respect we have two kinds of rights in the corporation. On the one hand property rights that are perceived as the only real rights on the corporation and contractual rights that are exhausted on the performance of the contract⁵⁸.

Under this prism, the notion of separation of ownership and control is completely denied. Eventually, the firm comprises only individual members that maximise their own utility in a strictly competitive setting⁵⁹. The control that managers exercise is denied as an imperative functional necessity and is relegated to the status of the aggregate of a set of high paid employees with more responsibilities that are to be assessed by the criterion of the efficiency of their individual contracts⁶⁰. Consequently the contractual theory reduces organisational associational structures and decisions to contractual performances. This means that the corporate organisational logic is renounced as a distinct and autonomous rationality that integrates otherwise diverging interests.

⁵⁷ Deakin and Morris (1995) p. 190

⁵⁸ See Wedderburn (1985) pp. 5-6

⁵⁹ Christman (1994) p. 144

⁶⁰ Ibid. See in this respect, particularly R.H. Coase (1937) pp. 386-405.

Moreover in following the rationality of the neo-liberal doctrine the contractual theory assumes that only individuals can legally bind themselves into contracts of employment. The contractual theory individualises the corporation in the sense that it perceives it as the sum aggregate of individual acts of exchange between natural persons⁶¹. As the corporate order is formed through acts of individuals, non contractual interests have no place in it. As a result what we have described as the collective interest of labour into a socially determined living standard⁶² cannot be recognised, as it is extra-contractual. The only labour rights that are recognised are those that are contractually stipulated. As a result collective bargaining as conducted on the basis of the recognition of collective interests involved is de-legitimised.

Building on our findings so far, we could say that the contractual theory favours the economically oriented subsystem of the enterprise. Through its application, the rationality of the impersonal order of the market is imposed as the sole principle of legitimating norms within the corporation. As a consequence, the only discursive genre that has a legitimate position in the internal order of the corporation is the economic. The problem of the incompatibility between the orientation of the enterprise towards the market and the organisation as an integrated system of relations is not seen as a problem at all, since the latter is constructed following the rationality of the former. The dimension of the corporation as a locus where various diverging interests are invested and goals are pursued is not taken into account at all, since these interests can be deemed as legitimate only to the extent that they can receive a contractual content. Moreover, according to the contractual theory, from the moment of the conclusion of the contract the parties are supposed to have as their sole purpose its successful performance. From the moment of its conclusion divergence of interests is not accepted as a condition that can receive legal recognition. Interests that derive their meaning outside the scope of contract are considered as non-valid. Therefore, according to the logic of the theory the corporation must be seen as a locus where legitimate contractually recognised interests exist in a mutually agreed commonality of purpose. However, as we are going to see in the following section contractual solutions in the corporation in no way cover the whole breadth of the employment relation. On the contrary they leave a wide margin of discretion as to the unilateral

⁶¹ Teubner (1993a) p. 130

⁶² See chapter one section 5

determination of the relation on property. It is this problematic aspect of the contractual perception that we are going to examine next.

3.1.2. Employment and the contractual nexus theory

We are thus faced with the issue of the normative logic of the contractual nexus theory. We have seen in chapter one that through the contract of employment the buyer not only purchases the labour power of the seller, but also the right to use that power for her/his own purposes. As a result the practice of labour is solely determined by the economic purposes of property that has the right to command it. In what concerns the corporation, this means that the employee through the voluntary act of the conclusion of the contract accedes to the system of authority that is already established in the corporation. In the first instance, a proponent of the contractual theory would claim that the right of property to organise and coordinate labour is not unilaterally taken and therefore does not violate the integrity of the worker since it is clearly accepted as legitimate by the voluntary act of the conclusion of the contract. In the second instance s/he would claim that the authority of the corporation as voluntarily recognised is based on the freely given consensus of the parties involved. Our next task is to test whether these assumptions have any validity in view of the actual practice of employment in the corporation.

Our starting point is the generalised system of authority that exists within the corporation. Our claim is that the authoritative dimension of employment in the corporation cannot be adequately justified on the premises of contract law. The hierarchical chain of command within the corporate order is in direct opposition to the fundamental contractual principles of equality and privity⁶³ of contract. Under the contractual schema the parties to the agreement maintain their individual freedom and autonomy towards each other. However, in what concerns the work system of the corporation, these fundamental principles have no application. The fact that the performance of the labour contract on the part of the employee, presupposes as its structural characteristic her/his subordination to hierarchical system of authority, flies in the face of any notion of equality⁶⁴.

⁶³ Privity of contract is the principle whereby the contract produces results only between the legal persons who have concluded it and in no way affects or can be influenced by the interests of third parties.

⁶⁴ See Gothold (1985) p.246.

Moreover, no contract can explicitly cover all the aspects of the relations that are regulated by it. Especially the contract of employment is left undetermined by design in order to accommodate the exercise of this authority in view of the specific needs of the enterprise of the employer⁶⁵. In this sense *'employers do not purchase a specific quantity of work, performed through a specific contract, but control over workers capacity to produce under an incomplete contract'*⁶⁶. Therefore contractual stipulations acquire their actual legal meaning through the context of the actual situations that the contract describes only in its very basic terms. This deliberate indeterminacy works in favour of the employer through the rule of the managerial prerogative that legally expresses the right of *'management to direct the workforce'*⁶⁷, as it is supplemented by corporate regulations and company rulebooks. Company rulebooks comprise a set of rules that regulate a variety of organisational issues⁶⁸ such as disciplinary procedures and payment systems⁶⁹, and thus have a major impact upon every employee's life, not only in what concerns her/his rights in the corporation, but her/his welfare in general as well⁷⁰. In most cases, regardless of the whether the rulebooks are incorporated into the contract expressly or impliedly (through custom), they are nonetheless covered by the logic of contract law. The employee is presumed to have wilfully accepted the web of regulations by virtue of the voluntary conclusion of the employment contract. In such cases company rules create obligations and confer rights that are legally perceived as contractual. However, in the more usual cases that they are not considered as contractual but rather as an exercise of the managerial prerogative and as such can they be unilaterally altered by management⁷¹. Nonetheless, employees are obliged to conform to them through an implied term to perform in good faith. Moreover there is a duty to the employee not only to comply with the rulebook but moreover to interpret the rules in a way that promotes the objectives of the business of the employer⁷². In this respect through these regulations the employer has the right to unilaterally interpret the normative context that contract

⁶⁵ Collins (2003) p.34

⁶⁶ P. Marginson (1993) p. 159.

⁶⁷ Collins (2003) p.34.

⁶⁸ On the rule book as a code that governs the workplace see Renner (1949) p. 114. On their authoritative nature see Marx (1976) pp. 423-424.

⁶⁹ See Collins (1986) p 4.

⁷⁰ See H. Collins, K D Ewing & A. McColgan (2001) pp. 88-91.

⁷¹ Ibid. p. 94

⁷² Ibid. p. 91 in commenting the decision in *Secretary of State for Employment v. ASLF (No.2)* [1972] ICR 19 (CA).

leaves undetermined. In this way the right of the employer to manage acquires such a wide scope of discretion that cannot be accepted by the notion of contractual equality. This is so, since the notion that the two parties in the contractual agreement preserve their individual autonomy is negated by the fact that the scope of discretion that each part is allowed as to the interpretation of the agreement is vastly unequal. On the one hand the employer has the right of unilateral determination over a whole area of the agreement, whereas the employee can only claim as a right what has been explicitly conferred to her/him. In this way we have a vast extension of the content of the managerial prerogative since the employer has the right to unilaterally interpret and amend the contractual agreement in a way that allows her/him to enhance his/her interests in anyway s/he sees fit without regard to the interests of the employees and of course without any prior negotiation with them⁷³.

Legal theory has attempted to give an answer to the problem of indeterminacy through the concept of implied terms⁷⁴. The basic idea is that since no contract can expressly cover all the aspect of the relation some of the terms are silently applied as accepted as enforceable obligations by both the parties. Such implied terms that are particularly useful in cases of long-term employment contracts include the recognition of the authority of the employer by the employee and the duty of mutual trust and confidence between employer and employee. It should be mentioned that these implied terms through long practice acquire a specific meaning when they are applied in concrete situations⁷⁵. In this respect the contract acquires a double dimension as a 'paper deal' and as a 'real deal'⁷⁶ where the first describes the written terms of the contract and the second the actual expectations of the parties as they can be considered as valid within the context of the contractual relation. The notion of the implied terms indeed recontextualises the employment as a relation that is normatively open and as such constantly evolving on the basis of its practice within the context of action where it takes place⁷⁷. However, it is based on an idea of contract that is altogether dismissed by the contractual purists that consider that in this way individual autonomy as expressed through freedom of contract is substituted by

⁷³ On this issue see particularly A. Fox (1974) pp.181-186.

⁷⁴ On an exposition of the notion of implied terms on corporate employment relations see C. Stone (1993) pp. 61-90

⁷⁵ See Collins (2003) pp. 34-37

⁷⁶ See Macauley (2003) pp. 51-102.

⁷⁷ See J. Whightman (2003) pp.143-186.

authoritative judicial interpretations⁷⁸. However these approaches finally cannot give an answer to the problem of the legitimation not just of the authority of the employer but rather of the generalised hierarchical system of authority that exists in the corporation. Contract does not take into account the fact that power and domination are determinant factors of employment. As we have already said contract cannot give a plausible justification for the relations of authority that exist within the corporation⁷⁹. The contract of employment rather than regulating exchange provides the justification for the introduction of the employee to a unilaterally determined normative order. It is more a contract of adhesion rather than a contract of exchange⁸⁰. This is so, since the employee does not just exchange services for wages s/he is moreover integrated within a certain normative order with an organisationally pre-determined set of rules⁸¹. It is the logic of these rules that we should examine as parts of an integrated organisation. As we have seen so far employment relations cannot be seen outside of the scope of the organizational dimension of the corporation⁸².

These remarks in a sense delimit the regulatory potential of contract for employment relations. As we have consistently held in this thesis the problem with contractual solutions to labour relations lies in the fact that contract albeit an excellent legal instrument for the legal handling of commercial relations of voluntary exchange is completely inadequate in itself for the regulation of employment that as we have seen is a relation that is characterised by the strange dialectic of conflict and interdependence has an inherent elements the authority and domination of property over labour. It is exactly a reduction of this dialectical character of employment to market relations of exchange that contract has to make in order to provide a plausible legal reading for the economic use of labour. As such and as we have already said chapter one contract law solutions cannot adequately account for the normative potential of employment relations as power relations that evolve over time.

⁷⁸ Campbell and Collins (2003) 46-49

⁷⁹ Collins (1986) p. 3.

⁸⁰ Selznick (1969) pp. 53-55, Kahn-Freund (1983) pp. 157-158. However as Kahn-Freund himself has said contract may be a legal figment it is the cornerstone of labour law (Kahn-Freund) 1997 p. 25. I think that its indispensability rests with the fact that without contract the employment relation cannot be initiated since as himself has elsewhere accepted the contract of employment covers only a small percentage of the actual content of employment. Kahn-Freund (1954) pp. 47-52.

⁸¹ See Kahn-Freund in distinguishing the difference between a servant and an independent contractor (1951) pp. 505-509

⁸² For a similar view see Collins (1986), (1993).

3.1.3. An assessment: property and the theory of contractual nexus

We have seen that the authoritative nature of employment in the corporation is inherent in its structure and we have found the legitimating principle of this authority is the notion of property. We can see now the contractual perception of employment in another yet similar context to the one we analysed in chapter one. What we saw there by analysing the work of Locke was that in the logic of liberal thought property, (albeit approached in a considerably different way than in late capitalism) is a higher order value than labour and as such it claims the right to command it. Even the more so, any understanding of employment as a relation of economic exchange in the last instance subsumes labour both in the abstract sense and in the person of the labourer under the determination of property. What we shall see next is how the contractual nexus theory is in a sense the application of a perception that considers property as the groundwork of social organisation. In this sense we can see the findings of our critique in chapter one as applied on a different field. We can see here the logic of the social development of property as a value that can legitimately dominate labour.

As property provides the primary interest in the corporation it becomes the supreme value in it. As a result action in the corporation is oriented towards the attainment of goals that property interests set. Under this prism the profit maximisation aim of the enterprise could be translated into the enlargement and enhancement of property rights. In view of the fact that property rights in the corporation are not identifiable in one person, property loses its tangible character as right upon a thing and becomes an idea that although economically manipulable and reducible to calculable quantities, attains a moral character. This moral idea provides both the source of legitimation of all the norms produced in the corporation and constitutes a higher order interest and value to be promoted and protected by them. In this way the hierarchical structure of the corporation loses its main character as a primarily organisational principle and attains the connotation of a moral order structured on the basis of an abstract proximity and affiliation to property. This approach reveals the deep metaphysical origins of liberalism. Property although eventually becomes ungraspable as a concept nonetheless produces moral rules thus developing a very strange almost theological hierarchy of values. As traditional metaphysics, from Aristotle to Aquinas constructs hierarchies of values based on their proximity on the absolute value of God, liberalism constructs systems of value based

on their analytical, functional and in the last instance political proximity to the absolute value, namely property.

In view of this, one could say that corporate hierarchy, besides having a functional role it also has a clearly ideological dimension, in the sense that it concretises the notion of a social hierarchy based on the absolute primacy of property rights. In other words the corporate hierarchy is but an ideological copy of a social order, based on the moralisation of property rights and on the moral justification of economically oriented action⁸³. This is what actually delineates the scope of the exercise of authority within the corporate organisation. It is instrumental to property and goes as far as it is useful for the protection and enhancement of it. The classical model thus loses its main argument, namely its claim to its consensual character and its inherently coercive nature based on the absolute power of property rights becomes apparent. Every other principle, force or value that might be at play in the organisation becomes instrumental to the interests of property and as a result when in opposition to it, has to be suppressed.

However, and in spite of the criticism that it has received, the contractual theory has attained to a wide degree the recognition of the legal system. The very significant role that contract has for every liberal legal system has influenced statutory legislation. So, generally speaking statutory regulations of employment in Europe have been adapted to the conceptual principles of contract theory. Nonetheless, as are going to see in the next section this paradigm has been challenged over the last by another that contests the absolute determination of corporate action by property. This approach was inspired by a variety of factors. As the most important ones we can identify the ever-increasing complexity of the corporate order combined with the gradual awareness of the legitimacy of interests other than the ones of property in the corporation. This perception that views the corporation as an institution focuses much more on its social dimension. Moreover, it recognises it as a locus where diverging interests and rationalities as expressed by different social forces converge on the basis of their interdependence. In other words we should see the institutional theory as a competing paradigm to the contractual theory. What our emphasis will be on is the fact that whereas the application of the contractual approach ensues in the domination

⁸³ The rational character of liberalism is turned on its head and its deep metaphysical character based on the sanctification and the consequent absolutism of the concept of property is revealed. The affiliation with neo-liberalism is more than apparent here.

and heteronymous determination of labour by property the institutional approach by integrating it and by internalising the oppositions, ambiguities and tensions that employment brings into the corporation attempts to suppress the representations of the aspects of domination in favour of a consensual approach that perceives employment as a cooperative relation. In this respect we will see here again the ideological dimension of legal constructs. In other words how ideological representations of reality can socially sustain relations of domination by representing and justifying them through abstract legal perceptions. We will pursue the ideological function of this in later sections but before to this we turn to the other major legal theory of the corporation namely the institutional theory.

3.2. *The Corporation as an Institution*

The institutional theory of the corporation emerged as an attempt to grasp the modern corporation not just as an economic actor but moreover in its dimension as an integrated associational system. The mainstream institutional theory of the corporation was developed in the first half of this century, by theorists such as G. Renard⁸⁴, G. Gruvitch⁸⁵ that build on the work of legal theorists such as O. Kirkheimer. Very significant to the latter development of the institutional theory of the corporation is the work of R. Savatier⁸⁶. We will briefly outline their main positions here especially the work of R. Savatier as it provided the basis for the modern understanding of the corporation in legal theory. A brief comment will be made on the work of T. Parsons that developed the sociological side of the institutional approach of the corporation. Additionally, particular emphasis will be given to the latter variations of the institutional theory, the most prominent one being the communitarian approach put forward mainly by P. Selznick⁸⁷ and A. Etzioni⁸⁸.

Systems theoretical approach to which references will be made, although has many similarities to the institutional theory particularly in what concerns the autonomy of the corporation as a system, provides an altogether different paradigm to be debated in its own merit.

⁸⁴ See *La théorie de l' Institution* (1930)

⁸⁵ See *Le temps présent et l'idée du Droit Social* (1931)

⁸⁶ See *Les métamorphoses économiques et sociales du Droit civil d'aujourd'hui* (1952).

⁸⁷ See mainly Selznick (1969)

⁸⁸ See *A Comparative Analysis of Complex Organisations* (1961).

3.2.1. The institutional theory of the corporation

In its early stages the institutional theory was developed as an answer to the inability of the contractual approach to grasp the reality of the corporation as a legal person. The biggest problem that the classical approach could not overcome was brought forward by G. Renard and developed later on by R. Savatier. This was the difference in the temporal horizon between corporation and contract. The corporation was of an open temporally open whereas contractual performance was temporally confined in the completion of a specific task. Savatier's position was that this problem could be solved through the concept of the institution. Of course, contractual theories have come up with sophisticated solutions to the problem⁸⁹, but their original incapacity is indicative of a weakness the organisational dimension that characterises later solutions.

The difference of temporal horizon between institution and contract provided the basis for the identification of further differences between them. First of all, Savatier stressed the social dimension of the corporation that takes shape in the form of the recognition of third party interests that are at stake in its operation and cannot be perceived by the classical theory⁹⁰. This is so, since the contractual approach due to the doctrine of privity considers as legitimate only those rights that are established through contract, such as the rights of creditors, suppliers etc.⁹¹. Under this perspective the corporation is the centre of multiple acts of exchange and as such is legally related only to its partners in exchange. On the contrary, under the perspective of the institutional theory the corporation acquires a new dimension in what concerns its social aspect. As such it can be seen as bearing responsibility towards the social sphere in general. This approach has brought about the whole discussion on the issue of corporate social responsibility that views the corporation as having obligation towards a series of social actors and dimensions such as its locality, the environment etc⁹².

⁸⁹ See Macneil (1980)

⁹⁰ For an account of Savatier's theory see Gottlieb (1983) pp. 586-588

⁹¹ Savatier of course worked on the basis of the French legal system. The doctrine of privity of contract is enshrined in Article 1165 of the French Civil Code.

⁹² For an account on Savatier's positions see Gottlieb (1983) pp. 586-588.

These are the general lines along which the institutional theory was developed. Of course these original positions by Savatier have been developed further. However, in what concerns the context of this thesis, the important contribution of the institutional theory was that it provided legal theory with a new conceptual basis for the understanding of the employment relation as it is actualised in the modern corporate structure.

3.2.1. The functionalist approach to institutions- Institutions as integrated systems of action-T. Parsons

Of fundamental importance to any legal-institutional approach to the issue of the modern corporation has been the work of the sociologist T. Parsons. Although his approach was sociological rather than legal Parsons put particular emphasis on importance of institutions for the process of social integration. The relevance of his theory for this thesis lies on the fact that Parson's theory of institutions as integrated systems of action on the basis of commonly accepted values and goals provides the basis upon which the corporation can be seen as an integrated normative system.

Parson's theory of institutions is a continuation of his theory on the irreducible normative character of social action⁹³. As he has noted: *'the elimination of the normative aspect eliminates the concept of action'*.⁹⁴ In the context of the corporation as a system of action, normativity must be seen as structural element with an integrative function. Specifically, Parsons sees the institution as an *'integration of the actions of a plurality of actors in a specific type of situation in which the various actors accept jointly a set of harmonious rules regarding goals and procedures'*⁹⁵.

This assertion provides us with a valuable insight into the relation of the enterprise with the organisation. The organisation thus becomes the system *'where the imperatives of a functioning process will differ from the logic of exchange'*⁹⁶ due to the fact that cooperation demands a set of rules more rigorous than a system of exchange relationships. The logic of cooperation and the set of rules it presupposes introduce the normative into the field of the instrumental and thus establish a new logic in their relationship. In other words Parsons sees in what we have described as

⁹³ Parsons (1982) pp. 93-95 on the notion of the action frame of reference. For an account and critique of Parson's theory of action see Habermas (1984) pp. 204-234.

⁹⁴ Parsons (1982) p.94. See chapter one fn.119

⁹⁵ Parsons (1991) pp. 71-72.

⁹⁶ Ibid.

the organisational system the source of the rules that aim at the attainment of cooperatively concerted action. This means that the organisation has the task of making what we have identified as different motives and rationalities of action to converge with the aim of the achievement of a commonly accepted goal. However, for Parsons institutional integration functions only on the basis of commonly accepted values. Institutions fulfil the task of specification of values in the sense that they translate values to specific social functions. Integration in its turn ensures the unity of values as they are applied in various social contexts⁹⁷. As A. Melucci has noted on Parsons *'an institution is the site of social mediation between a cultural totality (values) which is specified and a presocial multiplicity (Nature, needs) which is integrated'*⁹⁸.

The major contribution of Parsons's theory in respect to our subject of enquiry is that it provides the theoretical background for the necessity of the accommodation of this divergence within the corporation. However, Parsons believes that the answer lies in a shared system of values, whereas this thesis holds that it lies in the factor of the interdependence of the parties in the employment relation. Our thesis is that although values undeniably are a most important factor of social cohesion the agreement upon which of them should normatively guide employment is an extremely problematic issue. This so, since such an agreement comes up against the conflictual aspect of the employment relation, as it is expressed by the diverging rationalities of action that are involved in it. In simple words, in what concerns employment, the divergence of the discursive rationalities and motivations of property and labour make such an agreement a complicated task, since through the relation of employment they aim at the realisation of different interests that as we are going to see further on more often than not are legitimated on the basis of different values.

However the notion of values may become a crucial factor that opens the way to the recognition of this divergence. This is so, since integration presupposes the recognition of original diversity. In this sense Parsons's theory provides us with a groundwork on the basis of which we can search for the common values that property and labour may share within a situation that albeit conflictual, on the basis of interdependence forces the cooperation of the parties involved.

⁹⁷ Melucci. (1996) p. 250.

⁹⁸ Ibid. p. 251.

What we mean by this is that the organisational imperative of integration permits an interpretation that supports the recognition of the original diversity. In this respect, it presupposes the recognition of the multiplicity of discourses that operate in the corporation. In other words, the integrative role of the organisational discourse presupposes the mutual recognition of the existence of the diverging discourses as staking a legitimate claim in the normative pattern of the organisation. And as we are going to see further role the notion of values can play a key role for the negotiation of such a pattern.

Keeping this in mind we will try to unfold the basic perceptions of the institutional theory not as a consistent legal or sociological theory but rather as a current of thought that despite the diversity of the orientation of the various thinkers that have supported it persists in the notion of the corporation as an integrated system of action. What our focus will be on is whether this integrationist approach recognises or suppresses the original diversity of the actors in the employment relation.

3.2.2. Employment relations and the institutional theory of the corporation

Based on Parsons we are in a position to say that the integrationist logic of the institutional theory has provided the basis for the recognition of the validity of the various interests and discourses in the corporation of the integrationist logic of the organisation. It is the thread of this integrationist approach that we are going to follow next as it will allow us to unfold the multileveled complexities of the corporate employment relations.

The institutional approach has allowed labour to emerge as a legitimate corporate actor and stake its autonomous claim on the orientation of the operations of the corporation. However, it should not be forgotten that this autonomy has limits that capitalism and the economic purpose of the firm have set. What we mean by this is that the claims of labour cannot negate the purpose of the enterprise namely, economic activity. As P. Selznick has said '*to describe the business corporation as a social institution is not to deny that it is primarily an engine of capitalist economic activity.*'⁹⁹

Probably the assertion that sets the basis for the understanding of the complexity of employment in the corporation qua institution with a social dimension is that by G.

⁹⁹ Selznick (1992) p. 352

Teubner that *'the enterprise interest is directed towards creating reflexive procedural structures that will allow a mediation between the **main social task** of the enterprise and its various contributions to different sectors of social life'*¹⁰⁰. It should be stressed that with the term '*main social task*' Teubner does not refer to the profit maximisation aim of the enterprise, but to the productive contribution that the enterprise makes to society via its economic activity¹⁰¹. This main social task that Teubner describes with its contribution to the different sectors of social life is a factor that cannot in any case be challenged by the work system, since it provides the corporation with its public dimension that makes it an object of the general social interest. Therefore the corporate work system by definition has to function within the limits that the above mentioned premises, i.e. the public dimension and the economic purpose define. In this respect we can see the affinity of the institutional model with the approach of the welfare state towards economic action in the sense that they both share the belief that the latter should always be socially controlled in order to serve the common good. It is under the heading of the common good that the institutional theory approaches employment relations.

It is the perspective of the common good that allows the recognition of all the interests at play in the corporation in their own right. This is so since the institutional theory sees employment as an indispensable part of an integrated organisational structure that operates for the general social good. This recognition on the basis of its contribution to the integrated whole, emancipates employment from the limits that the contractual approach imposes on it, and allows it to project its demands to the corporation. Under this perspective the corporation can be seen as a locus where different motives, interests and strategies intersect and interact. Under this model, the principle of membership acquires a new meaning in the sense that it can now encapsulate a valid and legitimate right upon the corporation as a whole.

As a result, collective organisation is seen under a totally different perspective. Collective bargaining is not seen as a menace that the corporation has to put up with, but instead has a central role in striking a balance between what should be seen as equally legitimate interests. The system of authority is no longer accountable only to

¹⁰⁰ Teubner (1994) p. 27

¹⁰¹ Ibid. p.35 Therefore for Teubner, the interest of the corporation in itself, is distinct from all the interests that are invested in it.

property, but on the contrary it produces rules that through the recognition of the equality of interests aim at the normative integration of the corporation.

Under the institutional perspective, the normative dimension of any organisational system becomes of paramount importance. This is so since the notion of normativity provides the basis upon which cooperation between the actors may be achieved so that intrasystemic communications can be restored and therefore subsystemic contributions can be complementary instead of conflicting¹⁰². Here we can see another aspect of the affinity between the institutional theory and the welfare state approach in the sense of their preference for normative solutions. In this respect we see again the opposing perceptions of employment that we have described in chapters two and three. On the one hand we have an economic logic that reduces labour to the sphere of exchangeable externality and on the other a normative logic that socially integrates labour on the basis of its indispensability for the attainment of the common good. We have seen that the economic approach eventually becomes exploitative and coercive. We have also seen that the welfarist approach offers a compromise that comes at a cost. It is exactly this cost that we are going to examine next.

3.3.3. Communitarianism and the limits of the institutional model

At this point a short critique of the institutional model in its prominent communitarian version will be attempted. The reasons that we have chosen communitarianism as the paradigmatic version of the institutional model instead of assessing a more classical welfarist approach are many. The first reason is that communitarians have given us significant works on corporations. Moreover, communitarianism at least from the point of view of influence can be seen as the most vigorous contemporary opposition to the predominant neo-liberal doctrine. Finally communitarianism can be seen as the contemporary heir of a long intellectual tradition that focuses on the aim of social coherence; a tradition that starts with Hegel¹⁰³ and continues through Parsons¹⁰⁴ to MacIntyre¹⁰⁵. This tradition holds (as

¹⁰² Parsons (1982) pp. 164-165, see also Luhmann (1995) p. 391.

¹⁰³ It is no accident that some communitarians have attempted to trace back to Hegel the source of their theory. See Selznick's reading of Hegel in Selznick (1992) pp.65-68. See also Taylor (1975) (1979)

¹⁰⁴ Although Parsons was a renounced conservative his theories on the normativity of social action and on social action as aiming at social integration can be seen as being close to communitarians.

¹⁰⁵ See MacIntyre (1980)

Hegel did) that social (and this also includes economic) action should always refer to the common good.

Communitarians not only see the corporation as an integrated system of action but moreover as a factor of social integration that serves the bigger ideal of social cohesion. According to Selznick the institution is the middle term of the tripartite schema organisation-institution-community that encapsulates the communitarian ideal of socialisation¹⁰⁶.

As a result of its preference for consensual solutions as based on social practices communitarianism seeks integration on different level than welfarism. Communitarianism seeks common values rather than authoritative solutions imposed from above. Hence, of central interest for the communitarian theory is the informal structure of the organisation. According to P. Selznick's seminal work '*Law, Society and Industrial Justice*'¹⁰⁷, long held non-institutionalised practices preserve a significant role for a consensual system of private government¹⁰⁸, as they create channels of informal communication between management and labour. This informal form of communication allows problems and grievances to be solved at the lowest possible level, before being able to disrupt the 'normal' function of the system. It is in the form of non-institutionalised practises that P. Selznick recognises in corporate organisational particularities, the potential for the creation of a certain individual 'culture', based on the shared values that distinctively characterises them¹⁰⁹. Of particular importance in this model are as we shall see further on, mechanisms of conciliation and arbitration and internal grievance procedures¹¹⁰, that in a sense 'normativise' and 'democratise' the system and simulate it to a 'proper' legal system, since they provide the element of neutrality and fairness that is a prerequisite for the exercise of authority in democratic societies.

In this respect we can say that in this work by Selznick we find the first systematic attempt in legal theory for the recognition of an internal institutional arrangement in the corporation that creates valid legal norms, which provide the basis for the creation of an internal, private political system¹¹¹.

¹⁰⁶ Selznick (1992) especially pp.231-244.

¹⁰⁷ Selznick (1969)

¹⁰⁸ The term 'private government' was introduced and developed in this context by p. Selznick, in Selznick (1969) pp. 75-121.

¹⁰⁹ See Selznick (1992) pp. 321-322.

¹¹⁰ See Selznick (1969) pp. 154-178.

¹¹¹ Ibid. See below

The main weakness of the communitarian version of the institutional theory that is also the main weakness of its Parsonian version as well¹¹² lies in its downplaying of the conflictual element that is inherent in employment. It rather favours a consensual model of governance, aided by internal grievance resolution mechanisms that have as their aim the pacification of the internal system of industrial relations. In this respect, and in spite of the fact that institutional theory was the first to bring to the fore the diverging interests on the corporation, in a sense it downplays them by neglecting exactly this divergence. Although communitarians were the first to challenge the legal and moral primacy of the shareholder interest '*in favour of a more spacious conception of membership*'¹¹³ in the corporation they did so on the basis of an approach that largely ignores the rationality of employment as an inherently conflictual relation¹¹⁴. Eventually, the communitarian version of institutionalism tries to discover consensual possibilities at the cost of ignoring the conflict mechanisms that are operating in the corporate structure.

The communitarian critique of the classical model of the corporation attempts to reveal and embrace the moral dimension of economic action at the cost of a more critical stance towards the direction that it has taken in capitalist societies. However, communitarians do not contest the dominance of the economic amongst social discourses nor do they contest in essence the priority of its imperatives. On the contrary they try to demonstrate the social dimension of economic action and bring to the fore its inherent moral dependence¹¹⁵. In this respect they rediscover the moral dependencies of economic action so that they can recontextualise it, by making it adhere to rules as they are derived from socially valid values. However, as we have already seen, the relation of the economic to the moral discourse is at best problematic in capitalism, since the moral dimension of action is eventually instrumental to the preservation of the integrity of the market order¹¹⁶.

Nonetheless, it should not be underestimated that the communitarian critique provides us with a valuable warning of the social consequences of unfettered economic action and of the inadequacies of its scientific pretences¹¹⁷. However, under the communitarian paradigm, social discourses are not seen as opposing unfettered

¹¹² See Melucci (1996) pp.255ff.

¹¹³ Selznick (1992) p.346

¹¹⁴ On the inability of communitarianism to take into account conflict see Christodoulidis (1997)

¹¹⁵ See Etzioni (1988)

¹¹⁶ See chapter 2.

¹¹⁷ Etzioni (1988) pp. 114-135.

economic rationality, but rather as potentially beneficial to the self-referential goals of economic action. For some communitarians the claims of social discourses are not tested for their validity against the demands they project on social structure, but rather against their contribution to the economic system. For example, according to A. Etzioni workers participation is not assessed on the basis of its normative merit as a claim that should be tested against the social notion of the just, but rather it is endorsed as a moral way to enhance economic efficiency¹¹⁸. In a sense we could say that communitarians try to amend the consequences of the unfettered deployment of economic rationality by claiming that the social recontextualisation of the functionally autonomous economic action is potentially beneficial for the economic system.

In other words, the alternative proposal of communitarianism suggests a form of conciliation between the economic and the social that nonetheless concedes that the rationality and the goals of the former can never be challenged as to their validity by the former. Eventually, this conciliation comes to be determined by the economic. The authoritarian demands of the economic system upon social discourses are not challenged in their essence by communitarianism.

As a result of this consensual ethos of the communitarian approach the conflictual element in labour relations is not recognised as inherent. On the contrary, conflict is perceived as an unfortunate eventuality that occurs due to the inability of two parties to realise the hidden potential for consensus. Conflict is seen either as the outcome of social blindness and dogmatism or as the result of inexcusable group egoism that disregards the social consequences of its actions¹¹⁹. For communitarians as the case was for Parsons it is the common social and moral values that provide the context for this consensus. It is the ideal of social harmony that is at the root of this approach towards employment. However harmony cannot be attained when the causes of social conflict are ignored. As we have already said communitarianism disregards divergence in favour of integration. In this respect harmony becomes an abstract ideal that ignores reality. The communitarian perception of the relation between the moral and the economic which has as its ground a vehemently held, common value orientation, presupposes an agreement on the content of employment. On the other hand, communitarianism does not recognise employment as a relation that is ridden

¹¹⁸ Ibid. p. 239.

¹¹⁹ See Etzioni (1988)

by tensions and ambiguities. It does not recognise that conflict is an inherent, constitutive aspect of it.

On the other hand communitarianism had a substantial contribution in bringing to the fore the moral issues that are at stake in employment. What is important is that at least some versions of communitarianism reminded us that issues such as fair treatment and moral equality are issues that have to be central in any contemporary understanding of employment. However the precept of moral equality, an idea deeply influenced by the philosophy of I. Kant, does not touch upon the issues of substantive justice that are at stake in the corporate system. The whole issue of distribution is being underplayed in the sense that is seen under a perspective that looks for morally agreed rules of fairness rather than substantive rules of justice. In this respect the communitarian demand for moral equality seen as the potential of equal moral competence and vulnerability of social actors¹²⁰ reintroduces the Kantian Golden Rule to always treat others as ends in themselves¹²¹. Communitarianism suggests more than anything else, a stance, an approach that demands a moral awareness about employment. What communitarianism has made us aware of -and this is a major contribution- is that morality should not stop at the factory gates as it happens with the application of the neo-liberal approach.

This is a most important contribution but it should be our starting point and not our conclusion. In other words we are looking for an approach that can concretise moral equality into specific rights and duties with the acknowledgement of the fact that these rights and duties refer to a relation that is characterised by ambiguities and tensions that make it impossible for a simple and straightforward solution to be attained.

Our point on the contrary starts from the recognition of conflict and seeks a normative approach that does not pretend to overcome conflict altogether but rather to face it in its ambiguities and contradictions. We can not disregard conflict in the employment relation on the basis of a moral perception of what employment should ideally be. The complexity of the relation between property and labour makes it impossible for them to be solved through their subsumption under a schema of a common morality, a morality that in the communitarian case, by disregarding suppression, considers conflict as a sign of moral ignorance or legal non

¹²⁰ See Selznick (1992) pp. 482-498.

¹²¹ On the Kantian Golden Rule see chapter two fn. 33.

responsiveness. On the contrary this conflictual dimension is an inherent part of employment, a part that cannot be denied. And it is on the basis of the acknowledgement of divergence that we should seek the common values that might allow us to find a unitary normative approach to employment. But before we seek the grounds for this approach we should first understand what we mean by the term multileveled conflict as this will allow us to better understand the complexity that our normative approach has to deal with.

3.3.4. Registering Conflict in the Corporation. A Summary

We have repeatedly said in this thesis that conflict is an essential characteristic of the employment relation that is created by the ambivalence of the economic use and the social-human character of labour. What we have done so far in this chapter is to explore how this conflict between the economic use and social substance of labour takes shape when labour as an organised force of production is put to use for economic purposes as a relation between property as ownership of capital and labour as social and economic force. We have seen that the corporation is characterised in its rationality as a system by a structural dichotomy between its two 'subsystems', namely the enterprise and the organisation.

This first distinction has allowed us to delimit the main fields of conflict in the corporation as they are defined by the diverging demands of competitive exchange and cooperation. Our point is that cooperation is an imperative demand for capitalist production that can be induced either through the unconditional acceptance of market solutions or motivated on the basis of the recognition of the character of the employment relation as one of conflict and interdependence. The latter approach is based on certain normative presuppositions the most important being the recognition that the interests and discursive rationalities of the conflicting parties are of equal legitimacy and validity. It is on the basis of this background that we can delimit the fields of conflict within the corporate system.

What we have seen so far is that the two basic models express two different normative understandings of 'corporate complexity'. We saw the rationality of the contractual model as economically determined and as in the last instance justifying the domination and determination of property over labour. On the other hand we saw the rationality of the institutional model as one that socially contextualises the

corporation, at the cost of underestimating the conflictual element of employment thus advocating a consensual approach that nonetheless, recognises divergence. In this respect we have the conflict of two different perceptions of corporate employment relations that is determined by their respective perceptions of these interests, rationalities and discourses. In analysing the actors in the corporate operations we saw that not only do we have diverging interests but moreover, a conflict of rationalities through which these interests perceive their position in the system of corporate employment relations. Additionally, we saw that this conflict of rationalities takes the form of a conflict of discourses and on the basis of which they justify the legitimacy of their claims. In summarizing we could say that the context of the corporate system (the context that becomes the field where these conflicts receive their ideal form) conflict is simultaneously expressed as conflict of interests, as conflict of rationalities and discourses and finally as conflict of competing models as they express diverging ideological directions of the understanding of employment in modernity.

In this respect we can say that conflict in corporate employment relations is multidimensional. Nonetheless as we have seen conflict as a constitutive part of employment is conditioned by the equally constitutive part of interdependence. What we are going to argue next is that this dual constitution of employment finds its best expression in the institution of collective bargaining. We have indirectly addressed the issue of collective bargaining in the previous chapters of this thesis. However, in this section we are going to deal with it as the process that bears these characteristics that best encapsulate the tensions of employment in modernity. Moreover, this analysis aims at unfolding the normative problems that an approach that wants to go beyond communitarianism should take into account.

4. Collective Bargaining and the Corporation

4.1. The institution of collective bargaining

What makes collective bargaining fundamental is the imbalance of power that exists in the employment relation. In this sense collective organisation directly

challenges the power of property over labour in employment. This is so since the collective organisation of labour receives its legitimacy by invoking the character of labour as a social, collective force that claims a socially acceptable standard of living. Of course we do not hold that the presence of collective organisation magically restores a balance of power between the social forces of property and labour. On the contrary organised labour no matter how strong it may be by itself, without active political support that is materialised through legislative measures and political support cannot confront employers¹²².

In the absence of collective bargaining management is unimpaired to impose a normative system that follows the economic logic of property. Governance systems constructed unilaterally by management do not have as their aim normative considerations about fairness; on the contrary they usually create a set of rules with normative power that are constructed following the rationality of the economic discourse. In the last instance their function is but an instrument to the promotion employer's interests through the stabilising, monitoring and controlling of employee behaviour¹²³.

The particular focus on the institution of collective bargaining is due to the fact that in it, it is encapsulated in a clear form the ambivalence of employment in the sense that in collective bargaining not only we can see the confrontation between property and labour as social forces but moreover that in it is we can see as ideally expressed this ambivalence at its many levels i.e. the social, the economic and the legal. As we are going to argue next, collective agreements are not just texts that express an agreement between management-property and trade unions. They are an encounter of different logics, of different discursive worlds. In this respect this analysis will allow us to approach the paradox of employment as it is expressed as a social an economic and finally a legal relation.

4.2. Collective Bargaining and Collective agreements

The starting point of our analysis will be the institution of collective agreements and the way we can understand the multileveled tensions that are created through employment as they unfold through the practice of collective bargaining.

¹²² Kahn-Freund (1983) p.19.

¹²³ Edwards (1979) p. 106.

First of all collective agreements although in many European countries are considered as contracts, they cannot be easily perceived in all their complexity by traditional approaches to contract law. Collective agreements have the particularity that although they are legally assumed under the contractual form and although they have fundamental contractual characteristics they are simultaneously organisational arrangements about the distribution of power and economic agreements that determine the distribution of resources within the corporation. It is this dual organisational and economic significance of collective agreements that defines them as a legal instrument. As such they cannot be perceived as single acts of economic exchange and consequently cannot be compatible with the contractual nexus theory. We have seen in section 3.1 that the contractual nexus theory deconstructs the corporation to a multiplicity of individual interconnected contractual acts of exchange between individuals. Hence, the fundamental presupposition of collective bargaining namely, the recognition of collective actors and collective action is rendered incompatible with the logic of the corporation. Moreover, another basic presupposition of collective bargaining, namely the relation of inequality between the parties –that exists despite the extensive legislative measures that aim at its mitigation through the regulation of the contract of employment and to a series of employee protection legislation- is not recognised by the contractual nexus model¹²⁴. Additionally, the extension of collective agreements over time, the minimum standards that they set¹²⁵ and their erga omnes extension¹²⁶, make it difficult for the classical theory to explain them in terms of contract law¹²⁷. According to P. Selznick collective agreements emerged due to the inability of the contractual theory to adjust to the new and continuing institutions, which were created through collective bargaining such as the bargaining unit and the grievance machinery¹²⁸. On the contrary the presence of collective agreements promotes the notion of the corporation as an integrated body, since the system industrial governance based on collective

¹²⁴ We have seen in chapter two that bargaining inequality is recognised by the law as a structural condition between the parties and that extensive legislative measures for its mitigation have been taken by welfare state policies.

¹²⁵ Wedderburn (1992) p. 245

¹²⁶ The term denotes the procedure whereby the content of a collective agreement usually by an act of the administration or the judiciary covers non-unionised workers as well. See Simitis, *Die faktischen Vertragsverhältnisse* cited in Habermas (1992) p.150.

¹²⁷ Selznick (1992) p.306.

¹²⁸ Ibid.

bargaining creates a web of negotiated rules that can exist in the corporation only if we perceive it in its institutional dimension.

Our point is that although collective agreements could be conceptually perceived as contracts in reality they are something far more than that. According to O. Kahn-Freund a collective agreement is simultaneously a peace treaty and a legal code¹²⁹. It is a peace treaty in the sense that it is binding since the parties are under an obligation to abstain from conflicting action as long as the agreement is in force. On the other hand as a legal code it is a source of law in the sense that not only it establishes terms and conditions of individual employment contracts¹³⁰ but moreover it is the source of the legitimation of the internal corporative normative order.

In the words of the American Supreme Court:

*A collective bargaining agreement is an effort to erect a system of industrial self-government... It is more than a contract; it is a generalised code to govern a myriad of cases, which the draftsmen cannot wholly anticipate... The collective agreement covers the whole employment relationship. It calls into being a new common law - the common law of a particular industry or of a particular plant.*¹³¹

In this decision the character of collective agreement not only as a normative source, but moreover as the foundation of a political institution, namely a system of self-government is revealed. What our claim is, is that a collective agreement becomes an ever self-amending constitution of a political community that is based on the existence of a collective identity¹³² that finds its foundational principle in the notion of membership in the corporation. The corporate member is no longer an individual market actor but rather a member of a collectivity that is recognised as an active participant in the formation of the wider normative structure of the wider collectivity that the corporation represents.

What is negotiated in collective bargaining is not just the interests of individuals, but rather the power relation of the parties of employment as collective entities. And

¹²⁹ Kahn-Freund (1983) chapter 6 pp. 154-199. The dimension of the collective agreement as a legal code will occupy us extensively this chapter.

¹³⁰ Rogowski (2001) p. 185

¹³¹ *Steelworker's v Warrior & Gulf*, 363 US 575, 578-579 (1960), cited at Selznick (1992) p. 306.

¹³² On the issue of the corporation as the source for the formation of a collective identity see Teubner (1988) pp., 130-155

this negotiation allows us to seek on another level the meaning of the position of Kahn-Freund as it leads us to the various understandings of employment that we have so far described.

4.2.1. Legal approaches to collective agreements

What our task will be next is to find a legal approach to collective bargaining that could explain both the normative function and the political character of collective agreements as legal foundations of private legal orders. The point of this thesis is that the answer to their particularity lies in their ability to consensually produce derived norms that cover a wide range of employment relations. As we have said above, collective agreements are not contracts they are founding instances of legal codes in Kahn Freund's sense.

However, as collective agreements have strong contractual characteristics, especially in what concerns their conclusion through a procedure of negotiation we are going to continue our analysis by looking at the theories of contract that can best describe the particularity of this consensual character. For this reason I will use the contributions of what I consider as the most suitable in the context of our analysis. On the one hand we will deal with what has been described as the communitarian model of contract as developed by I. Macneil¹³³ under the title of relational contracting and on the other the reflexive approach of G. Teubner¹³⁴ as these to theories will provide the basis of our analysis.

4.2.2. Collective agreements and relational contracting

We will start with the theory of relational contracting as an attempt answer to the ever evolving normative content of employment. In this respect we can see it as an effort to give a plausible explanation of the temporal dimension of employment in contractual terms. What this theory as developed by I. Macneil¹³⁵ focuses on is the permanence of the relations that some contracts initiate. Macneil claims that contracts that establish long term relations should be distinguished from what he calls transaction contracts, since the former do not exhaust their normative intent in one

¹³³ Macneil (1980)

¹³⁴ G. Teubner (2000)

¹³⁵ Macneil (1980)

single transactional act but rather govern complex long-term relations. Macneil focuses on what he calls relational contracts that create mutually beneficial relations for the parties involved over a long time span. The theory of relational contracting as implied by its name puts emphasis on the aspect of the relation between the individuals involved in contracting. According to Macneil the approach of the parties to the application of contractual terms becomes more flexible in the sense that they do not stick to the letter of the text even when this provides them with rights that could in the short-term benefit them. On the contrary the emphasis is on the mutually beneficial unhindered continuation of the relation. In Macneil's own words, long-term contracts establish mini societies. It is in this respect that we can see its application in collective agreements. Collective agreements regulate relations that are of permanent and evolving character that moreover just as societies are characterised by conflict and interdependence.

The relational approach to collective agreements has the great benefit that it captures their character as setting guiding rules of long-term relations rather than as sets of exhaustive rules of distinct transactional acts. Its weakness however rests on the fact that with as all communitarian approaches its focus is on cooperation at the cost of neglecting the inherently conflictual character of employment relations. According to Macneil conflict in relational contracts occurs when there is confusion between long term and short-term interests¹³⁶. This applied in the case of labour means that the relation of the actor's interests is one of cooperation, which can be hindered by the non-awareness of their commonality. The model misses the aspect of conflict by focusing on the aspect of interdependence at the cost of oversimplifying the complexity of the relation of employment. In other words the relational theory wants to apply to capitalist relations of production a communal-synergistic model of relations that appears at odds the character and the actual practice of employment in modernity¹³⁷.

4.2.3. Reflexive contracting

The next paradigm that we are going to analyse is Teubner's theory of reflexive contracting as it discovers and confronts the interdiscursive character of contract¹³⁸.

¹³⁶ Macneil (1980) p. 42

¹³⁷ Teubner (2000) pp. 405.

¹³⁸ Teubner (2000) pp. 406-407.

By drawing an analogy between contract as an institution of private law and the idiosyncratic character of collective agreements we will attempt to discover a legal understanding that sheds light as to the latter's particularities as they legally express the ambiguous characteristics of employment.

According to Teubner, contract brings together two worlds, two discourses always mediated by a third, namely the legal. For Teubner a '*contract is a text written in three languages (legal rights and duties, economic costs and benefits, the project of the work involved, goods and services)*'¹³⁹. Contract from a legal instrument for the regulation exchange becomes the mediating vehicle of an interdiscursive project¹⁴⁰ that involves the instantaneous translation of one discourse into others. However, according to post-modern philosophy interdiscursive translation is either impossible or may only lead to an unavoidable '*differend*' where one discourse imposes itself upon the other as the rule of decision of their difference¹⁴¹. Teubner finds his way out of this paradox through what he calls productive misunderstanding. He starts his analysis by asserting that no discourse can actually understand the stake of the other due to the cognitive and operative closure of discourses. The one discourse is closed in its autopoietic circle of reproduction and perceives the other as a cognitively open environment that can provide information that has to be processed according to the rationality of the processing systemic discourse. As such the other discourse can only provide information that when detached by the rationality of its own systemic logic is perceived by the system as environmental noise that has to be translated in the rationality of the system. This means that the system when meeting information derived from another discourse has to translate it to its own rationality in order for it to be an element in its autopoietic reproduction. However this entails a fundamental mutation of the informational element. If information is to be a part of the system's autopoietic reproductive circle then it has to be an element of the system in its own terms. This means that information is taken away from one systemic rationality, and becomes an operative element in another. As such it changes its original meaning. In other words the system misunderstands it on the basis of its own rationality so that it can understand and use it. And this of course is a process that takes places simultaneously in all the systems involved. For Teubner the process of productive

¹³⁹ Ibid p. 408.

¹⁴⁰ Ibid. 407.

¹⁴¹ For the concept of the differend see Lyotard (1988).

misunderstanding makes possible the use, the exploitation of each other's dynamics without breaching the autonomy of each other's reproductive circle. In other words what Teubner claims is that through the notion of productive misunderstanding contract becomes an extraordinary text with a unique binding power. As such contract renders compatible -yet without denying their structural incompatibility- diverging social discourses that albeit momentarily meet in order for the completion of a specified task that demands the cooperation of more than one discourse. For Teubner it is of vital importance that discourses when they translate they have what he calls the right of freedom of translation. This means that when translated, the discourse keeps the right not to be invaded, not to be violated in their integrity in the act of translation. The right of freedom of translation is essential for the process of productive misunderstanding: In order for misunderstanding to be productive discursive freedom should not be violated as it is the principle that protects the integrity of discourses towards each other¹⁴².

As we have seen in chapter two, contract gives legal content to relations that always have a dimension that is of economic significance. This means that in contract we always have the application in one way or another of the economic discourse. This means that the interdiscursive model can be applied from the moment that we have an 'encounter' of the economic with another discourse; an encounter that creates a relation that has to be legally mediated¹⁴³. In this case contract regulates the subsumption of an economic relation under the form of private law through the creation of legally enforceable rights and duties that appertain to individuals qua economic actors. In contract we always have two discourses present: the legal and the economic. Interdiscursivity can be applied from the moment that a third discourse encounters the economic in a relation that has to be legally mediated. It is this relation that reflexive contracting model describes. This allows us to see the paradigm of reflexive contracting under another prism: in view of the predominance of the economic discourse, we can see that the problem that interdiscursivity through the principles of misunderstanding and of discursive autonomy tries to solve is that of the submission of societal discourses to the rationality of the economic. In this respect productive misunderstanding acquires an additional dimension: it does not only

¹⁴² Ibid. 410-412

¹⁴³ '... Contract is reappearing as at least three projects in different social worlds (1) a productive agreement (2) an economic transaction; and (3) a legal promise'. Ibid. pp. 403-404.

answer to a cognitive a problem that concerns the translation of one rationality to another with the aim of mutually acquiring a productive benefit but rather becomes a normative attempt to give a solution to the issue of domination of the societal discourses by the economic one.

This brings us directly to the application of the interdiscursive theory of contract to collective agreements. In this case we clearly have a case of encounter of different discourses. On the one hand we have the economic-technical discourse of property and management and on the other the discourse of social needs and desires as represented by labour, as both being mediated by the logic of the legal system. Moreover we have a productive agreement that is imperative to be performed, since both the parties depend on it. However in the context of employment this bringing together is not a momentary occasion that will be protected by the systemic closure of the discourses that converge on an ad hoc basis.

According to a position put forward by Derrida, freedom of translation i.e. interdiscursive autonomy '*presupposes separation, heterogeneity of codes, ... the non-transparency*'¹⁴⁴. However systemic closure, the heterogeneity of codes does not amount to non-transparency in what concerns collective agreements. Collective agreements are determined by the substance of the employment relation as one of conflict and interdependence, in other words by an ambivalent relation that as we have seen cannot be surpassed within the limits of capitalism. As a result they are determined by their constant interaction. In this respect it is their relation that determines the rationality of their respective discourses and not vice versa. What we mean by this is that the social discourse of labour and the economic one of property in what concerns employment may be operatively closed to each other but at the same time they are cognitively open. This cognitive openness is of course achieved under the presupposition of misunderstanding. In other words they understand each other in their own terms. Moreover interaction and cognitive openness leads to a certain form of their 'codetermination' in the sense that they are not formed separately of each other but rather under the condition of the imperative of their relation¹⁴⁵. As a result

¹⁴⁴ Derrida in 'Theologie de la traduction' in 'Du Droit a la Philosophie' p. 29 cited in Teubner (2000) p. 410.

¹⁴⁵ In a similar vein that refers to contract Teubner says: '*Thus one contract puts at least three discourses under the obligation of their simultaneous self-transformation, toward achieving their respective projects*' Ibid. p. 407. The similarity here is more than apparent in the sense that in collective bargaining labour property and the legal system converge on the basis of achieving their separate specific ends.

the discourses involved in employment mutually draw the limits of the deployment of the rationality of the other. It is the inevitability of economic imperatives that draws the limits of labour claims and it is organised labour power that sets the limits on the demands of the economic discourse. In this respect we have a constant interaction between systemic logics that derive their identities through their interrelation on the basis of their opposition, whilst under the mediation of the legal system¹⁴⁶. In this respect we see the multileveled conduct of the dialectic of the employment relation. The actuality of the interests and their respective power positions determine the limits of the deployment of the rationality of the discourses. As such the discourses are co-formed on the basis of their relation. Their cognitive horizon is conditioned by the presence of the other part in the dialectical relation that employment is. In other words through collective bargaining property and labour learn each other and form each other on the basis of the indispensability of their relation.

A problem that reflexive contracting has to face is that interdiscursivity presupposes the recognition of the mutual validity of the stakes of the discourses involved; something that more often than not is not the case in what concerns collective agreements¹⁴⁷. The problem becomes even more acute with the addition of managerialism as the legitimising ideology of property domination. Although the problem conditions the normative understanding of employment as a whole, it appears in a most clear and distinct form in collective bargaining. The problem of domination here is combined with the scientific pretences of the economic discourse. As we have already seen, the problem starts from the fact that the economic discourse considers the validity of its assertions as universal truths deducted from scientific methods. Through managerialism the social dominance of property is translated into discursive dominance. Here we can see again the strange dialectic between property and labour. The rationality of the economic discourse can be curbed only by its dependence on labour. What can curb it and actually make it a part of a dialectic relation is actually the collective power of labour. Dialectic starts from the moment that the dominant part is dependant on the repressed. This means that if the rationality of the economic can evade the social determination of labour then the dialectic relation cannot stand

¹⁴⁶ We should forget the role of the law in monitoring and influencing the process of collective bargaining whilst setting the limits of the content of collective bargaining.

¹⁴⁷ We should forget that reflexive contracting is not a theory of the employment relation. On the contrary what we say here is that its basic principles can be applied to it as adapted to the particularities of employment.

anymore. What we will have instead is a rationality that on the basis of its dominance will not accept its other-determination. In other words it will try and avoid its subsumption under a dialectic relation where it will be determined by its relation to another. This is perhaps the reason why property has tried to subsume labour under its rationality. If labour as labour power is understood as property then property does not have to relate, does not have to have an other determination, does not have to condition itself in its relation to the other, i.e. labour. The dialectic between property and labour starts from the moment that the dominant part, namely property recognises labour as the other that is not determined by the same logic, by the same discourse as property. It is only on this basis that interdiscursivity can be applied to collective agreements.

Another problem that reflexive contracting has to deal with is the fact that a collective agreement does not make centrifugal social discourses converge momentarily but on the contrary forces conflicting yet interdependent discourses to cooperate on the basis of permanence. In this sense the convergence does not take place on the basis of the specificity of the actual task to be performed but rather under the imperative of the establishment and the sustenance of a relation that is indispensable in its permanence for both parties. In this respect a collective agreement does not regulate a single project on the basis of which divergence has to converge but a permanent relation that constantly evolves in the interrelation of its parties. Therefore it may be described as a project but in reality it is the initiation of normative 'world' as Teubner himself would have it. By transferring the notion of Teubner's contracting world we can see interdiscursivity as the cornerstone of the normative world that collective agreements initiate. Reflexive contracting suggests a normative logic that pertains to the specific relation that contracts regulate. Moreover this normative logic determines the relation in its specific characteristics. Collective agreements do exactly the same thing namely, the convergence of difference on the basis of permanence under ambivalent conditions. It is in this that we can find in reflexive contracting a description that by analogy can be valid for collective agreements. A contracting world, just like a collective agreement, is not free of ambiguities and tensions, perhaps not even of domination. On the contrary it provides us with a schema that allows us to deal with the convergence of heterogeneity and divergence as it occurs in employment. It is for this reason that the recognition of

discursive rights¹⁴⁸ (as Teubner has it) becomes in the last distance the recognition of autonomy, difference and integrity.

4.3. Collective agreements and managerialism

We have seen in the previous section that the influence on the collective bargaining process of the predominance of the economic discourse and have concluded that although it negotiates on the basis of equality it does not abandon the pretension of the universal validity of its claims. What we are going to attempt in this section is to re-introduce managerialism in the context of collective bargaining, as this will allow us to see the premises under which the whole process is conducted.

First of all collective bargaining entails a substantial limitation in the extent of the managerial prerogative. Many issues that would be unilaterally decided on the basis of this principle become negotiated on the basis of the power positions of the parties. However, management negotiates under contradictory premises. Negotiation is a process, where partial interests converge with the aim of reaching a 'fair compromise'¹⁴⁹. Negotiations become rather problematic when one part claims universal validity for the claim that it brings forward to be 'negotiated'. In this case for management we have a truth that has to be compromised. In other words management negotiate for what on principle they consider as non-negotiable with those whose claim they consider as irrelevant. This means that from the part of management the rejection of collective bargaining is not a contingent position that is based on the redistribution of power that they produce but moreover a position that stems from the rationality of their role.

Therefore, the big compromise for management lies in that that they negotiate altogether rather than that they make 'concessions' to labour. This is nonetheless done on grounds of expediency rather than principle. It was that the fact that coercive practices were deemed as non-productive and the fact that organised labour is in a position to incur considerable costs to the enterprise that forced management to

¹⁴⁸ Ibid. pp. 412-414.

¹⁴⁹ On bargaining as the process through which conflicting interests reach a fair compromise see Habermas 1996 pp. 139-141. For a critique see Teubner (1997b).

cooperate¹⁵⁰. Therefore, when management accept collective bargaining they do so with the view that stable collective bargaining may make a positive contribution to the stability of the corporation. This explains the fact that when management have the power to avoid collective bargaining but moreover any form of labour empowerment in the form of work control they do so without any hesitation¹⁵¹.

In other words management may have to take into account trade unions and even recognise them as legitimate negotiators, only to the extent that the latter may be in a position to damage the corporation, by making use of the sanctions that they have at their disposal namely obstruction and withdrawal against management. These sanctions may take a variety of forms, from influencing the workforce to be uncooperative to management directions up to open industrial action. The effective use of sanctions of course presupposes strong trade unions that have first of all the necessary influence upon the workforce but also the resources (economical, political, institutional etc.) that may allow them to engage in conflicting strategies. Even in the case of the pluralist model of company¹⁵² that is based on the cooperation and the mutual recognition of the parties, the arrangement of interests is not concluded upon agreement but rather upon a fundamental compromise. As a rule in these cases management will be loyal to the system and not undermine the arrangement, only to the extend that a) labour is strong and can potentially harm the corporation b) collective bargaining and participation is conducted in a way that management's own purposes can be promoted and we add here¹⁵³ c) when the basic premises of managerialism are not challenged by labour.

The latter means that management can by no means accept a challenge as to the validity of the cognitive assertions that it makes by using economic methods nor the normative claims that are deduced on the basis of the above-mentioned assertions. For

¹⁵⁰ As W. Benjamin has said '*...the effort toward compromise is motivated not internally but from the outside, by the opposing effort, because no compromise, however how freely accepted, is conceivable without a compulsive character*' Benjamin (1979) p.143.

¹⁵¹ As the typical example of this approach is the case in the Volvo factory in Uddevalla Sweden. In this factory labour had an extensive control over its tasks, it was actively involved in the decisions that concerned production and moreover was conferred with a substantive sets of rights protected through the internally presence of 'ombudsmen' that were recruited from within the workforce and trained for this purpose. However, despite its success this was the plant that Volvo choose to close when in the early '90s when unemployment in Sweden rose from 1.8 per cent in 1974 to 7 percent in 1992 and it was no longer necessary for management to offer labour attractive working conditions in order to recruit them. For analysis of the Uddevalla case see Gorz (1999) chapter 2.2. In other words labour empowerment is 'conceded' by management only on the basis of expediency and never on principle.

¹⁵² See Fox (1985)

¹⁵³ For a very similar view see Fox (1974) pp.155

example, in the typical case of the negotiations for the conclusion of a collective agreement management will come forward with a proposal that will 'offer' labour a certain level of wages that can be the 'best possible that the corporation can manage'. Although the term 'best' implies an evaluative element, this element is suppressed, since this best is presented as cognitively-instrumentally quantified and justified. Truth as we know is something that is non-negotiable. This 'best' should be accepted by labour as a datum the violation of which would threaten the corporation and thus the continuation of employment. However, labour's acceptance is instrumental that is, based on a calculation of its own self-conflicting interests, whereas management make a validity claim. Moreover, this validity claim is not only cognitive, it has a strong normative element normative element, an element that is expressed through the use of the term 'best.' However in what concerns management the notion of the best possible implies a rationally constructed social relation. The argument goes that since science provides the knowledge of how things are, it also prescribes the course of action that should be taken in order for human goals to be attained. Instrumental rationality does not consider the question on the way things should be as a valid autonomous demand. Economic rationality, as we have seen in chapter two derives the normative 'ought' from the cognitive 'is' and subordinates the former to the predetermined by the latter's ends. However, in our case the action that should be taken is not instrumental oriented, but concerns an agreement upon the normative content of a social relation. In this case, the cognitive-instrumental stakes a claim upon the normative, with the aim of subjugating it.

In this sense the acceptance of collective bargaining by management is purely strategic, not oriented towards rational agreement upon the validity of norms and a mutual understanding¹⁵⁴ but with the aim of prevailing over them¹⁵⁵.

4.4. Collective agreements and the normative corporate order. A conclusion

We have said that collective agreements ideally reflect the ambiguities and tensions of employment in modernity as a relation of conflict and interdependence

¹⁵⁴ For the concept of strategic action see Habermas (1984) especially pp.273-338.

¹⁵⁵ See *ibid.* pp. 294-295.

between property, scientific knowledge and technology and labour. In this respect at this point we are going to summarise our findings so far so that we will be able to see the multileveled dialectic of employment as it is expressed in the field of its actual practice.

First of all, collective agreements ideally express employment as a relation between social forces and rationalities. As we have said the parties in collective agreements are not individual actors but rather collective forces that converge on an agreement on the basis of their divergence.

By transferring Teubner's thesis in the field of employment relations we have seen that in collective agreements we have the encounter of centrifugal discursive genres, the convergence of centrifugal social worlds. We could say in interpreting Teubner's theory of contract, that the collective agreement is a text that among other things provides the normative framework for this encounter, for this convergence. However, as we have seen a collective agreement is not just a contract, it something far more than that. First of all, a collective agreement whether at plant, sectoral¹⁵⁶ or national level is the regulation of a power relation. Here the encounter of discursive genres does not have as its aim the completion of a certain productive task or of a certain productive project but rather the regulation of a relation that is determined by the encounter of diverging and moreover conflicting discursive genres on the basis of their interdependence. In a collective agreement we have the regulation of a relation as actual interests and rationalities of social action encounter each other in employment. In this respect what we have is not the encounter of two texts as Derrida would have it¹⁵⁷ but the encounter of two ever evolving contexts of social action that converge on the basis of their interdependence and as such are codetermined in the deployment of a multileveled dialectic. Moreover, this dialectic determines a permanent relation that from thereon is radically determined as a relation of paramount social significance by the rationality of the legal system. However, the legal system is not a unified field without its own contradictions and paradoxes. As it represents an authoritative medium of power it is itself contested by the groups of interests that are represented in employment. The legal system has to deal with the competing claims and compromise them on the basis of the common good. This mediation means that the respective logics of property and labour that determine a

¹⁵⁶ For the conclusion of collective agreements at sectoral or plant level see Crouch (1994)

¹⁵⁷ Derrida (1987) *Psyche: l' invention de l' autre* p. 135 cited in Teubner (2000) p. 399.

power relation of conflict and interdependence 'transfer' their relation to another field. This means that the parties at any level of employment are not engaged in an unfettered power struggle but in a legally conditioned one. And as we have seen the legal system as the immune system of society does not allow conflicts to receive a form that can actually threaten the balance of the societal system, a societal system that is based on the dominant position of property over labour¹⁵⁸.

In this respect we find again what we have said in chapter one on the fact that interdependence cannot negate conflict nor conflict interdependence. The dialectic that we are dealing cannot be overcome unless we transcend the relation between property and labour as a relation of domination. This structural condition could only be sublated through the liberation of labour from the domination of property, a development that Marx anticipated in its writings. However, as the overthrowing of capitalist society is not an issue here, what needs to be stressed is the nature of this relation. What our claim is here, is that collective agreements although they can never provide a way of transcending this ambiguity provide a way for the negotiation of it on the basis of the mutual agreement on the existence of the ambivalent relation. Collective agreements in other words create a dialectic of codetermination of discourses that cannot touch the character of the relation as one of power between a dominant and a repressed social force. Moreover, they create a normative framework that works as a platform for the continuation of the relation by providing the basis upon which its inherent normative dynamics can be developed. This is their limit. Collective agreements simultaneously express the conflict inherent in employment as between social collective forces but on the other they express their conditioning as contributors to the common good. As we have seen in chapter three collective bargaining and collective organisation functions under the auspices of the law. This means that their content cannot evade the rationality of the legal system. Under this perception conflict should be controlled so that it will not damage the common good that embraces all the interests that are invested in employment.

In this respect we can now reassess the saying by Kahn-Freund that a collective agreement is simultaneously a peace treaty and legal code. It is a peace treaty in two senses: First of all it regulates the conduct of conflict, so that it will not break out into an open clash between the social forces in employment. Secondly, a collective

¹⁵⁸ Luhmann (1995) pp. 393-397.

agreement imposes on the parties the obligation to respect it while it is in force. In this respect there is an obligation of peace in what concerns the issues that the agreement regulates.

What we will focus next is its dimension as a legal code. In this respect a collective agreement not only stipulates the basic rules of employment but also provides the basis for the construction of the normative web of institutions, procedures and practices that regulate its conduct. A collective agreement with its multileveled determinations is also a foundational act, a constitutional text that sets the basic rules for the symbiosis of a quite unique form of community; a text with both a legal and a political significance.

5. Private Government

We have said in the previous section that a collective agreement is a legal code that brings into being a normative web of internal institutions, procedures and practices that constitute the corporate private government system¹⁵⁹. What we are going to argue is that the constancy and the many levels of the unique dialectic of employment reveals that its tensions and ambiguities should be seen under a perspective that accepts them as valid and as ever evolving on the basis of their relation. In this respect the analysis of collective agreements bring us directly to the issue of the private government system as a form of an organisational-political understanding that deals with the paradoxes of employment¹⁶⁰. It is private government systems that emerge as systems of rules that regulate the action of a political community that is constituted around employment that we are going to examine next. What should be stressed is that the model that we are dealing with here is based on collective bargaining, as collective bargaining is the institution that provides the foundation for the creation of a system of rules that recognises the validity of all the interests involved in employment.

On this basis we will try to explore private government that has a 'private' legal system that is an integral part of the political-organisational system of the corporation. The unique character of private government comes from the fact that it provides us with an understanding of employment as it takes shape through its actual practice. As

¹⁵⁹ For the notion of private government as a systems of private justice see Henry (1983).

¹⁶⁰ For versions of the political theory of the corporation see first Kahn-Freund (1954) and (1977), Selznick (1969) and also Steinmann (1986), Bercusson (1990).

such private government systems are not strictly constructed on the basis of the rationality of the legal system in the sense that they adapt to the particularities of each corporation¹⁶¹. This means that although they are reflections of a wider legal culture¹⁶² they do not express the rationality of the state but rather the rationality of the actors in each particular corporation. In this sense private legal systems are the result of the will of the parties to solve their conflicts on the basis of their interdependence without the direct intervention and the authoritative solutions of the State apparatus. However, it should not be overlooked that at the same time these systems are under the influence of the wider legal culture and therefore they incorporate -albeit in an indirect form- its approach on the legal regulation of employment. In this respect we have the presence of the rationality of the state without having its authoritative intervention.

5.1. Private government and membership as citizenship

We have said that systems of private government mediate between the conflicting interests and rationalities that exist in the corporation. In this way the conflict that exists between property and labour and between the economic and the social discursive genres is internalised. Conflict is internally contained within the corporate structure as a subsystem that exists in contrast and in parallel to the enterprise interest¹⁶³. This coexistence delimits the potential of private government. As A. Melucci has remarked¹⁶⁴ there are inherent limits as to the effectiveness of such systems since they are conditioned by the instrumental character of formal organisations as systems of representation of dominant social interests. These dominant social interests are not and cannot be challenged by private government regimes. This is not their aim. Their aim is to provide through the recognition of divergence the basis for its containment so that the continuation of the relation (an aim that all parties embrace) can be achieved and be mutually beneficial.

¹⁶¹ Here we see again Selznick and his notion of corporate culture. See Selznick (1992) pp. 300-310.

¹⁶² On legal rationality not being the exclusive characteristic of state law but also a characteristic of non-hierarchised plural legal orders see Teubner (1992)

¹⁶³ For the notion of conflict systems as subsystems that are constantly conditioned within the encompassing social system see Luhmann (1995 pp. 393-404).

¹⁶⁴ See R. Melucci (1996) pp.249-255.

What we will argue next is that the principle that provides us with the key for the understanding of private government as a consensually, institutionally established system that deals with the paradoxes of employment within a contained perpetually operating organisational system is that of membership.

Membership should be seen as the basis upon which all individuals are recognised as legitimate holders of rights and duties within the corporation. In other words membership should be seen as a form of political subjectivity that recognises the individual member as a participant in a normative order that is constructed on the basis of rules that are accepted by all parties concerned as valid. What is important to be stressed is that membership is devoid of any meaning if we accept it just as a formal legal principle that defines the individual just as a part of a normative order without having the rights to actually participate in its determination.

Membership should be seen as a unifying principle that forms an identity on the basis of the acknowledgement of difference as it is realised through employment in the corporation. As Wieaker has remarked '*the socio-empirical reality of the social group types 'association, corporation'... lies in the group consciousness of the members and their partners and in the specific nature of the group's behaviour*'¹⁶⁵. What we are therefore seeking here is to find an understanding of membership that can help us understand how the idea of interdependence of interests creates a collective identity that appertains to the members of the corporation qua members of a political or quasi-political community. Teubner albeit in a different context of research provides us with a valuable insight as to the direction of our enquiry. As we have seen, Teubner by looking for a valid description of the corporate reality addressed the problem of the corporation qua legal person¹⁶⁶. What Teubner asserted in respect to this issue is that what provides the essence of the corporation as a legal person is the linkage between corporate actions and a corporate collective identity through mechanisms of attribution of corporate action¹⁶⁷. What is of interest in the context of this research is how the notion of collective identity is linked to the attribution of action to the corporate actor.

What we mean by this is that the actions of corporate actors thus become actions of the corporation. In other words actions acquire their meaning through a corporate

¹⁶⁵ F. Wieaker 'Zur Theorie der juristischen Person des Privatrechts' p. 367 in Festschrift für Huber (1973) cited at Teubner (1988) p.138.

¹⁶⁶ See Teubner (1988) (1994).

¹⁶⁷ Teubner (1988) pp. 139-140.

collective identity that is externally represented (in the market and the legal system) through the legal person of the corporation. However, if we accept that actions of corporate actors are attributed as actions of the system to the corporation, then we accept that we have a higher order, a higher level of integration of action where these actions refer. As a result the corporation by creating a collective identity that represents it externally, becomes the junction, the node that the internal contradictory relations find their point of expression. This means that actions refer to the corporation and create relations that acquire their meaning in the context of the complex corporate reality. It is in this respect that we can see the corporation a community that is organised on the basis of a collective identity that finds its foundation in the concept of membership.

To make this a bit clearer: On the one hand we have the corporation as an actor that by participating in the antagonistic environment of the market with other corporations acquires an identity (the Schmittian friend-foe opposition)¹⁶⁸. On the other hand this identity eventually becomes internalised in the corporation itself. However, collective identities are not without differences, tensions and conflicts. This means that these characteristics exist as essential elements of the collective that the corporate order itself is. Just like the collective identity that a nation-state creates as a higher order of integration that subsumes conflicts that cannot transcend it, in the same sense the corporation becomes the locus, the point of reference where conflict and divergence find a point of reference, a mode of expression. In other words the friend-foe distinction is internalised as delimiting a conflictual relation that nonetheless cannot reach the Schmittian schema of radical enmity between absolute foes¹⁶⁹, as the conflictual aspect is conditioned and moderated by the fact of the interdependence of the parties.

Therefore membership should not be seen as access to the participation to a competitive community of market actors where economic interest can create a unity of goal between corporate actors. This approach would define membership just by the economic goals of the enterprise and as such would ensue in the one-dimensional determination of the corporation as an economic actor; under this prism membership justifiably would be limited to the property rights holders (and as we have seen this

¹⁶⁸ See C. Schmitt (1979)

¹⁶⁹ Moreover for Schmitt absolute enmity was a condition that can emerge only between nation states. Ibid.

identification is rather problematic). On the contrary membership should be seen as the participation in a multidimensional community that functions on the basis of conflict and interdependence of interests, rationalities and discourses as they coexist within the context of the strange dialectic of employment. Therefore membership provides us with the basis for the search to a normative approach that can internalise divergence and conflict as inherent characteristics of the corporation as a community. In a sense we can see that membership internalises in the corporation the principle of citizenship as political subjectivity, as the conferment of rights on the basis of the recognition of the divergence of equally valid interests¹⁷⁰.

It is for this reason that membership should mean the conferment of rights to its members. It is for this reason that political communities recognise to their members rights that guarantee their freedom to pursue conflicting strategies against each other. This means that certain conflictual situations are recognised as legitimate realities that should be contained within the communal normative framework. The most typical example is the recognition on the part of the state of the right to strike as the legal recognition of the existence of social conflict as created by the nature of employment relations.

To return to the issue of the corporation, I consider that membership should be seen as a political principle that in its dimension as political subjectivity provides the basis for the institutionalisation of a community. And it can do this only on the basis of the recognition of equality of interests and the conferment of substantial rights within the community that employment in its ambivalent character creates. This means that this community is not an ideal world of content employers and employees but rather an integral field of struggle that integrates and reproduces its ambiguities and tensions as they are produced through the practice of employment. It is exactly the organisation of this community that we are going to deal with next.

5.2. The Presuppositions of Private Government

I consider that the notion of membership as citizenship should provide the basis of democratic corporate governance. If membership is to have any meaning within the

¹⁷⁰ On the notion of citizenship as enshrined in the rationality of the labour law see H. Collins, K D Ewing & A. McColgan (2001) pp. 58-59. See also below.

context of a democratic corporate culture, if it is to be the legitimating principle of authority in the corporation, it should be justified on a basis that is accepted by all participating actors. This means that the corporate interest, the collective identity, should be formed on the basis of a principle that can justify unity within difference, interdependence within conflict. As we have repeatedly said, for this to be possible the recognition of the validity of all the interests invested in the corporation is an imperative. However, if this unity is to be achieved in a non coercive way, then the notion of the absolute priority of the economic should be put aside as it introduces a partial and non-generalisable principle that expresses demands of only one of the parties of the relation as the general rule that cannot be disputed in its basic premises. However it is exactly the challenge to these premises that provides the justification of the existence of an autonomous interest of labour in the corporation in its own right.

Therefore if private government is to stand as a normative approach to the recognition of the ambivalent nature of employment we will have to challenge the priority of the property interest in the corporation at its root and this means not by basing the legitimacy of workers interests on the beneficial economic contribution of labour to the corporation qua economic unit, nor on the abstract notion that the good moral treatment of workers that promotes cooperative industrial relations eventually becomes economically useful, as some communitarians would have it. On the contrary, the starting point of our analysis is based on the premise that the hierarchy of interests and discursive genres in the corporation is not a logical a priori that stems from the superior rationality of the economic discourse as some neo-liberal thinkers would have it, but rather a socially constructed fact that has its origins in the relation of domination of property over labour that capitalism systematised as a general principle of social organisation. It is on the basis of this approach that we will attempt to analytically unpack the legitimisation of the corporation as a system of institutionalised power.

We have argued above that the economic goal of the enterprise cannot be negated, particularly since in a sense it provides the *raison d'être* for the corporation. However, can this mean that the economic interest of property can normatively claim precedence over the social one of labour? My view is that it cannot. The fact that the corporation comes into existence as an economic actor cannot negate its dimension as a productive unit with contributions to various social sectors. It is on the basis of this definition that we can challenge the predominance of the economic discourse and not

on the moralistic assumptions of communitarianism. It is in this social dimension of the corporation that allows us to see under another light the mutual dependence between the economic to the social and socially recontextualise economic action. Economic action as we saw in Teubner's definition on 'enterprise interest' in the last instance is not a self-referential function since its productive role should be conditioned by its social contribution, by the contributions that it makes to the '*different sectors of social life*'¹⁷¹. In this respect the economic interest of the enterprise is socially conditioned by the satisfaction of social needs and this of course includes the needs and desires of labour. In this respect we see that the non-negation of the economic by labour works in both ways. As the needs and desires of labour cannot negate the economic purpose of the corporation qua productive unit, the economic purpose of the corporation cannot negate the needs and desires of labour as they express the needs and desires of a society that creates an economy that exists *prima facie* in order to sustain them. This means that the self-referential reproduction of the economy has to be tested by its social performance. This means that any economic premise in the last instance has to be justified by its social approval. The fact that the free market economy in capitalism becomes the point of self-reference of the reproduction of society, and consequently becomes a system that imposes its needs and imperatives on society should be seen as one of the main side effects of capitalism; a fact that it is ideally reflected in the structure of employment in the corporation. By this we mean that the primacy of the economic as it expressed in the domination of labour by property should be challenged on the actual and paradigmatic field of its application namely, corporate employment relations. In other words, when we talk about equality of interests in the corporation we do not talk about an abstract ideal or a social vision but rather about a demand that is actual and real and that can be justified by the structure of employment itself. The bottom line of this is that the equality between the interests of the parties is based on their interdependence, an interdependence that as we have seen is a structural condition of employment and hence of every society that is based on paid employment. And here we can see the true meaning of interdependence, namely its application as a principle that should create a normative framework on the basis of mutuality and solidarity within difference. As we have said in chapter one this relation is dialectical in the sense that

¹⁷¹ See this chapter, footnote 100.

both parts determine and depend on each other despite their incompatibility. And this is the real meaning of the notion of unity within difference. And it is this unity within difference that also gives to the notion of the mutual dependence of social needs and economic action. Under this model no actor and no discourse can claim a natural right of sovereignty over the others¹⁷².

5.3. *Codetermination and its limits.*

The most important and influential attempt so far for the creation of an institutionalised system of democratic private government, that has come as close as possible to the aim of the recognition of equality of interests, has been the system of works councils and of codetermination that exists in the Federal Republic of Germany¹⁷³. Works councils have existed in many European countries after the Second World War in an effort to create peaceful industrial relations in order of to avoid class conflict in view of the gigantic task of the reconstruction of the devastated economies of the Continent. The system –first established in the years of the Weimar Republic- was revived initially in 1951 and received its present form with the laws of 1972 and 1976. What needs to be stressed is that works council are independent bodies and in no way are institutionally linked with trade unions. The stance of the latter towards works councils has been quite inconsistent ranging from the embracement of their role to open hostility¹⁷⁴.

Works councils are elected by all eligible for that purpose workers and exist in every firm with over five employees. Their role is to represent the interests of the workforce in all matters of its concern. The size and the rights of the works councils depend on the size of the firm. Codetermination rights cover a wide area of matters and extend amongst others working time, health and safety protection, monitoring of the workforce performance, pay structures etc. It is important to be stressed that works councils have nothing to do with collective bargaining. This procedure is negotiated between trade unions and management.

¹⁷² Teubner (1993) p. 140.

¹⁷³ For work councils and issues that they raise that are familiar to the context of this research see amongst others Weiss (1987), Streeck (1984), Gotthold (1986), Lembruch (1985), and Teubner (1986).

¹⁷⁴ Rogers and Streeck (1995) pp. 11-16.

Moreover, in firms with more than twenty employees, the management needs the agreement of the works council on all important issues concerning the workforce such as transfers and job classifications etc. If the works council disagrees with the decision, the employer must take the case in front of a Labour Court. Moreover, in cases of dismissals the employer has an obligation to consult the works council. If s/he omits to do so the dismissal is void. If the council forms an official protest the dismissal is suspended until the decision of a Labour Court.

Codetermination rights extend to the participation of the workers in the supervisory board of the firm. Amongst its many powers the supervisory board is that it appoints and revokes the appointment of the members of the board of management. Moreover it has the right to demand information on all company matters. According to the Codetermination Act of 1976 in large firms that employ more than two thousand workers, the representatives of the workforce participate in equal numbers with the representatives of the shareholders, the latter however having the decisive vote in a case of a split vote. What is important is that at all levels of representation the representatives of labour are directly elected by the workforce.

The underlying principle of this system is the acknowledgement of the fact that labour and property have conflicting interests that have to be accommodated on the basis of their interdependence. It acknowledges them as two distinct parts with conflicting interests that nonetheless have to converge in a common direction of action. Here relationalism but moreover interdiscursivity acquire a new dimension that evades their original contractual origins.

Relationism becomes relevant in the sense that codetermination is a system that evades the logic of exchange and incorporates the individual contract of employment in a system where collective differences are constantly negotiated with the view of reaching a fair compromise on the basis of the interdependence of the parties. Moreover, relationism is even the more relevant since codetermination puts emphasis in the long term practice of the employment relation and creates an institution, a forum where the parties involved constantly discuss and review the content of their relation as it evolves in its concrete practice. Apart from anything else codetermination creates a constant channel of communication between management and labour where at least the interests of the parties are known to each other.

Additionally -and here is where the principles of interdiscursivity apply- through the system of codetermination the discourses involved in employment come into

contact not momentarily as in a typical contract of exchange but in an institutionally regulated, permanent system of interest mediation.

Moreover, codetermination has another major effect in the conduct of conflict in the sense that it internalises it within the corporation. In other words the institutionalised system of mediation of interests transforms employment relations from market relations of externality to internal elements of the corporate system. This means that, as Luhmann has noted, that through codetermination worker's interests are no longer external cost factors that must be minimised but a legitimate goal for the intra-organisational process itself¹⁷⁵.

However, and although it certainly has a most positive contribution to the empowerment of labour and to the creation of a cooperative model of industrial relations¹⁷⁶, codetermination is not a panacea that can magically solve all the problems that as they stem from the ambivalent nature of the employment relation.

Teubner in describing the enthusiasm of many social and legal theorists on the effects of codetermination has noted that *'is conceived as a remedy against alienation... in a number of variants co-determination is considered as compensation for social domination'*¹⁷⁷. However, this optimism about this institution seems to be quite exaggerated.

For example W. Streeck has stated that codetermination effectuates a *'mutual incorporation of capital and labour by which labour internalises the interests of capital just as capital internalises those of labour, with the result that the works council and management become subsystems of an integrated, internally differentiated system of industrial government which increasingly supersedes the traditionally dualistic class based system of industrial relations'*¹⁷⁸.

This position expresses the fact that through codetermination the interests of labour become recognised as interests of the corporation that can now emerge in its dimension as a community. However, we should not forget that the internalisation of the interests of capital and labour and the surpassing of the conflict between them is something that by far evades the scope of codetermination¹⁷⁹. As we have repeatedly

¹⁷⁵ Luhmann (1966) Worker Participation and Decision Making p. 8 quoted in Teubner (1986) p.267.

¹⁷⁶ For the codetermination as reflecting the development of industrial relations towards a more cooperative direction see Krause (1985) pp. 154 ff. cited in Teubner (1993) p. 125.

¹⁷⁷ Teubner (1986) p. 263.

¹⁷⁸ W. Streeck (1984) p. 35

¹⁷⁹ On the opposition between the profit maximisation interest of the enterprise and the interests of labour representation see Kubler (1984) pp. 429 ff.

said, this conflict is a structural condition of capitalism and as such cannot be surpassed as long as the capitalist relation between property and labour persists.

This means that the ambiguities and tensions of employment can only be accommodated, perhaps suspended, but not surpassed. Labour alienation and domination cannot be overcome by labour participation through works councils. I agree that the loss of control over the working process is a fundamental factor of alienation (as we have seen in chapter one) – a loss that works councils mitigate to a considerable degree. As we have seen labour alienation is a direct consequence of the command power of property over labour as it exists in capitalism. However, although challenged in its exercise and often attenuated in its strength by work councils, this power cannot be negated in its substance. As we have shown in commenting on Hegel's *Phenomenology* the non-alienated self-consciousness of the worker exists in his/her creation. The alienation of labour is a condition that codetermination cannot reverse. It substantially mitigates it by giving to labour some control over the working process. However, it cannot alter the consequences of its commodification nor annul the power of command that property has over it. Codetermination does not and cannot transform the corporation to a synergy of equal between themselves producers. What it does is to give back to labour a considerable part of its power of self-determination in the form of work control and this only through the mediation of labour elites¹⁸⁰. This means that labour through codetermination does not magically become self-determined. For this to occur, the whole structure of the relation between property and labour should change at every level. Nonetheless by reducing the scope of the unilateral power of management, it does give back to labour some control over the labouring action.

Despite the critique that claims that the effects of codetermination for the individual worker are quite limited¹⁸¹, we can see here a most important consequence on the life of the worker as an individual. Due to codetermination the worker cannot be treated arbitrarily by the employer as s/he can no longer unilaterally impose his/her will without restraint. On the contrary s/he employer has the obligation to justify her/himself to the worker about his/her actions that influence the worker's life and

¹⁸⁰ On another level we have the classical problem of the distance between the elites of labour representatives and the rank and file. See Michels (1959). See also chapter three section 4.2.2.

¹⁸¹ Teubner (1986) pp. 263-264

dignity. We see here again the incorporation of the notion of citizenship in the context of employment.

However it should be stressed that such an approach on the part of management is adopted on strategic grounds. Whereas the aim of labour is to reassert its self-determination through job control the aim of management –we should not forget that work councils were imposed by law in a period when the reconstruction of Europe demanded the attenuation of class conflict¹⁸²- is to improve production though worker's suggestions that could be economically beneficial¹⁸³. We should not forget that in the German case that we are now discussing, work councils were not the outcome of a consensual procedure between management and labour. They were rather the result of a direct intervention by the state, an intervention -and this is crucial- that did not impose to the parties the content of the employment relation. On the contrary -and this is indicative of the role that the welfare state can actually play- what was imposed was the obligation to constantly negotiate under an imposed legal framework that nonetheless was created in order to empower labour.

With acknowledging its limitations, I consider that the actual task of co-determination is to consolidate the recognition of the equal validity and legitimacy of the claims of property and labour to the corporation. This is so since, through it claims and interests take an active form and are practically translated as rights on the corporation as the whole body politic. Its most important achievement is that it has created a normative model that perceives the corporation as something that does not belong exclusively to anyone. Moreover codetermination affirms the nature and the importance of employment at the societal level. It recognises in a most emphatic way that the corporation is dependant on employment. Additionally, it recognises the corporation as a locus where diverging interests have to accommodate themselves on the basis of their interdependence and most importantly, it creates permanent institutions for this purpose. What needs to be stressed is that as the case is with any community, power relations and conflict of interests do exist within it. However, as we have already said there are communities that are based on coercion and others that

¹⁸² Streeck (1995) pp.313-317.

¹⁸³ For example as S. Henry has shown the approach between management and labour in the introduction of health and safety programs Whereas labour's main focus was on improving working conditions and gaining work control, management's was the improvement of production S. Henry (1983) Private Justice p. 86.

are based on recognition of their internal divergence. And the challenge that faces the modern corporation is exactly the negotiation of this divergence.

5.4. Private government and rights

We have argued that the corporation is not a private concern but a public body. This means that the corporation is not a money producing machine that operates in a social void. One of the many consequences of this is that it has to respect and why not to promote notions of justice. This means that –and this brings us back to the issue of the substantial issues- any legal approach towards employment should take- the corporation should encapsulate those values that are considered as guaranteeing fairness as to the distributive outcome of employment. However, the attempt to encapsulate these values should start from the recognition of divergence and conflict within the corporation¹⁸⁴. In this respect rights should protect employees in the areas where they may be vulnerable due to the character of employment as a relation of domination. In other words employment rights should cover those issues that have to do with the livelihood and dignity of workers.

5.4.1. Rights to welfare

As for the issue of welfare we have extensively talked both in the previous but also in this chapter we are not going to occupy ourselves extensively here.

What should be made clear is that rights to welfare that are rights to a fair wage, to good working conditions, to a decent working environment etc., are determined by many factors and regulated at many different levels. First of all they are determined by both state regulation and by collective bargaining that as grasping the fundamental significance of labour for the balance of the whole societal structure cannot allow the distributional outcome of employment to transcend a certain limit of social tolerance. As such welfare rights reflect the balance of power between the parties involved in employment and therefore are being constantly negotiated and renegotiated.

¹⁸⁴ Moreover, rights would not have any meaning as a legal safeguard of a value unless someone could be in a position to threaten this value.

5.4.2. Procedural fairness

Having addressed the issue of livelihood, we have to address the issue of fairness. Practically this means that systems of private justice should provide the guarantees that are enshrined in the principles of the rule of law when at the same time having the task to accommodate the tensions that the ambivalent nature of employment produces¹⁸⁵. This means that they have to adopt the principles of a system that is created to be neutral whereas at the same time it is located within the same system that conflict is produced. In the case of the state labour courts this neutrality is achieved since they are above the case in front of them and they base their rule of their decision on the notion of the common good, whereas here the rule of the decision is based on the good of the corporation itself and to the optimum continuation of its function with all its diversity. Moreover, since in private government regimes we do not have the guarantees of the state legal systems, the integrity of internal legal procedures should be guaranteed by the selfsame parties involved. This means that conflicting parties have to create a legal system where we have the problems that the litigants are the judges of their own selves. In other words we are looking for the magic formula that can consensually solve conflicts the moment that it operates under conflictual conditions.

The two main forms of those mechanisms are mediation and conciliation, arbitration and grievance procedures. The case with arbitration in most countries is quite clear. Arbitration mechanisms guarantee the impartiality of judgement. Additionally, the fact that the difference is solved privately, in combination to the fact that the procedure is much cheaper and faster than the official one, has made arbitration quite attractive as a procedure over the last decades¹⁸⁶. The problem lies with grievance procedures. There are a variety of forms of existing grievance procedures. The fact that they operate at the level of every corporation that adopts them, forces them to adapt to particular needs. Therefore, they reflect a particular

¹⁸⁵ On the importance of the safeguarding of the legal principle of due process in private government regimes see Selznick (1969) pp. 250-257.

¹⁸⁶ One might argue that arbitration is not internal to the industrial private government system, since it is legally established and recognised. However, the fact that recourse to it is not obligatory, that recourse to it is provided for quite often as obligatory by collective agreements makes its function totally dependent upon the will of the parties. Additionally, we have stressed that the person(s) who solves the difference must be a disinterested and neutral third person. It cannot then be a member of the corporation having an interest in it. See Selznick (1969) pp. 184-185. For the process in the UK see H. Collins, K D Ewing & A. McColgan (2001) p. 24.

understanding of employment as it can be expressed in every corporate culture, but moreover the balance of power between management and labour as it exists within it. Nonetheless, for grievance procedures to be considered as guaranteeing social standards of legality their impartiality must be assured. However, if they are alien to the corporation the advantage of solving problems and grievances at the lowest possible level and on the basis of the common corporate culture is largely lost. The practice is that the members of grievance procedures committees are usually members of the corporation.

This complicates the situation even more, since in the cases to be decided by the internal legal system the stake is not only the individual interest of the person(s) directly involved. Every difference that is produced through the 'work system' eventually reflects the interests of the corporate actors. This means that private industrial legal systems do not just deal with grievances between individuals but rather accommodate a constant conflict between the collective interests as they exist in the corporation.

Apart from procedural fairness another issue has to be raised here and has to do with its unilateral or not character. Unfortunately, in many corporations particularly where collective organisation is weak, controlled by the company, or even non-existing, grievance procedures are totally controlled by management. This of course, may provide a pretence of fairness in the conduct of the organisation towards its members, but it cannot be considered as a proper legal procedure that can guarantee fairness. It has been remarked by theorists in industrial sociology that this model of grievance procedures, is used by management as an offer to de-motivate workers from organising collectively. The idea here being that collective organisation is not needed, since the organisation provides for normative guarantees of fairness. As B. Edwards has claimed, after the war many companies adopted this procedure, by introducing company unions in combination to grievance procedures in order to exclude independent union participation¹⁸⁷. However, in this case grievance procedures are not a conflict resolution mechanism, but rather an instrument for management to monitor the degree of motivation and contentment of the workforce. It may be used as a forum for the solution of differences as between the workers amongst themselves, between workers and supervisors or even managers, but the rationality of the mechanism aims

¹⁸⁷B. Edwards (1979) p. 106.

at the promotion of management interests on the workforce. The rationality of the mechanism in other words in the final instance is bound to favour the economic rather than the normative. Therefore, under such circumstances we cannot say that we have a proper legal system since first of all it does not provide adequate procedural guarantees for its fairness and even the more so since it primarily economically and not normatively oriented. Such a system cannot earn the trust and the support of the workforce, nor their uncoerced recognition since it inherently suffers from partiality.

Of great importance to systems of private government is what P. Selznick as we have seen has defined as corporate morality. Selznick claims that in corporations we have the establishment of long-term practices that are determined by the dimension of the corporation as an actor with social and moral responsibility¹⁸⁸. In this sense we have the development of a system of informal rules and practices that quite often prevail over the strict application formal of rules. In this sense the parties although they might have the opportunity of recourse to grievance procedures they will abstain from it with the view that the continuation of the relation is more beneficial to both of them and would only be damaged by a formal confrontational procedure. In this we should see a whole system of informal practices that are normatively produced by the dynamics of the employment relationship.

We see here the validity of the analogy that we drew earlier in this chapter between collective bargaining as a legal code to the system of the rule of law. This is so since they both provide a normative framework that guarantees certain legally recognised rights. In a sense they both provide at different social levels a guarantee for the freedom of social action so that individual and collectivities can pursue their strategies.

5.5. Rights and the legal basis of private government

What has emerged from our analysis so far is that the corporation must be seen as a political system of organised power that through its institutions mediates between the diverging interests and discursive rationalities existing and interacting in it. This analysis allows us to develop the basic premises around which the system of private government should be built.

¹⁸⁸ See Selznick (1969) pp. 28-26 also Selznick (1992) pp. 238-244.

First of all through industrial democracy the authoritative dimension of corporate employment is transformed. It is no longer an authority that derives its legitimation solely from the relation of domination between property and labour. It depends on its social re-contextualisation and on its correspondence with the values that are imported in the corporation through labour. It is in this respect that the corporation ceases to be a private concern and becomes a public body. As such it is determined by its social role but moreover by the discourse on justice. It is in this context that we should see the recognition of rights in the corporate order. Rights are the recognition of the fact that labour is an action with a social dimension and employment a socially significant relation. Therefore, and as we have already said the notion of citizenship does not stop at the gate of the factory but continues to be a major normative principle within it as well. The worker lives within a social context that recognises legally enforceable rights that the contract of employment cannot possibly violate¹⁸⁹. The rights that we have briefly outlined above have another dimension since they are derived from a perception of employment as a most important relation for society. A perception that views the worker not just as private individual, but rather as a citizen who has rights. In other words we see yet again the dependence of the economic on the social. The economic becomes socially re-contextualised not on the basis of the beneficial effect of social values upon its performance, as communitarianism would have it, but rather in its inherent dependence on these values. The fact that economic action should not transcend the common social values is expressed on one level in the mutual dependence of capital on social labour and on the other on the understanding of the worker as citizen. It is on the basis of this recognition that private government should legitimate corporate authority if it is to have any meaning at all. It should focus in other words on the issue of interdependence but this time on the basis of equality of interests and of equal validity of discursive rationalities that have to coexist without the dominant economic being in a position to unilaterally determine the social one. In other words what we are seeking for here is an understanding and a practice of employment that recognise its dual character.

The notion of rights that we have described should be seen as a fundamental aspect of employment relations within the corporation. They are rights that are derived from a certain understanding of the employment relation as a relation of

¹⁸⁹ See H. Collins, K D Ewing & A. McColgan *Labour Law Text and Materials* (2001) pp.58-59. More extensively on the issue see also Collins (2003) pp. 205-249.

conflict and interdependence that moreover is determined in the societal level by the perception of the worker qua citizen. In this respect rights should not be seen as something imposed by the state legal system on the basis of authoritative definitions of the common good but rather as an indication of a social legal culture that incorporates a wider legal perception at the corporate level. It is in this respect that the law can have an active participation in the affairs of the corporation. In other words through codetermination the law does not impose unilateral solutions but rather sets a framework for the negotiation of these solutions. In other words it respects collective autonomy by creating institutions that allows the parties of employment through a multileveled process to form the content of employment by themselves. The crucial point is that employment rights should not be seen as something unilaterally granted by the state but rather as legal guarantees that derive their validity from the validity of the social discourses upon which they are embedded and legitimated. The role of the state as a freedom guaranteeing institution is to recognise and support them. This means that rights derive their legitimacy from the common conception of what can be deemed as fair in all the aspects of the employment, a conception that stems from the normative beliefs that are formed through the experience and the practice of employment. Additionally, industrial rights in the above-described sense in the last instance derive their validity as legally enforceable through their exercise in the context of the political micro-system of the corporation. Moreover it is in the micro-legal system of the corporation that their enforceability in practice provides them with a substantial context. In other words their context is determined by the actual practice of employment on the basis of the recognition of its ambivalent character as a relation of conflict and interdependence. Industrial rights should start from the bottom and encapsulate the true interests and the rationality of labour as reflected in the ongoing social discourses if they are to have any real meaning at all. In this respect we need a notion of legal pluralism that is not based on a hierarchical model based on the primacy of state law but rather one that derives its normative validity that from its responsiveness to the actual relations that it aims regulating¹⁹⁰. We will not go in details into the concept of legal pluralism, as the issue is not within the scope of this thesis. What we are interested in is to show that corporate (i.e. non-state) legal orders can produce valid and generally acceptable legal norms and not which is their relation

¹⁹⁰ See Teubner (1992)

to the official legal system. Our position here is that we have a multiplicity of legal discourses that do not hierarchically refer to the state law nor depend their legitimacy on its approval. According to Teubner in modernity legal phenomena emerge in the context of highly specialised discourses that are the sources of social self-reproduction, which the law then misreads as sources of norm production¹⁹¹. The problem as correctly Teubner puts it is not that of the integration of the diffuse and informal social norms to the legal system under their formalisation as legal rules but rather the *'recoding of a bewildering multitude of otherwise coded communication in the code of the law.'*¹⁹²

In my view this approach provides us with the basis of approaching on the first level the legal system of the corporation and on the second the legal regulation of employment.

Our point is that the concept of private government with its internal quasi legal system, allows us to understand the validity of its internal procedures as deriving from a socially valid perception of legal rationality as adapted to the problems that the practice of employment creates. It is in this sense that at corporate level we can have a more responsive approach to the normative problems of employment rather than the direct regulatory approaches of state law. The legal recognition of rights is nothing else but the recognition of the notion that the employment relation is an ambivalent relation of the outmost social relation that suffers from the paradox of interdependence and conflict. Moreover, they imply a value judgement in that they actively support the weakest part in this paradoxical relation i.e. labour. On another level, industrial rights help us understand the political character of employment since they provide the basis for the creation of an internal corporate notion of citizenship that is based on the understanding of the corporation as a community that through the assistance of the legal system can be self regulated on the basis of the recognition of identity through the divergence schema. The recognition of conflict is most important in that conflict is perceived as a structural element of the relation that should not be artificially suppressed but rather incorporated in it and be allowed to produce its normative results. Conflict in this way is contained within a certain horizon that does not negate the interdependence of the parties in the employment relation.

¹⁹¹ Teubner (1992) p.1457

¹⁹² Ibid.

On another level rights promote the deliberative aspect of employment relations. Their focus is on the continuation of the relation, on the continuation in other words of the community that is based on the existence of the recognised collective identity. However, we should not forget that the notion of identity does not imply homogeneity of interests but rather introduces a basis for the negotiation of divergence. In other words if any notion of industrial democracy is to have any meaning employment relations should be seen as the constant deliberation over a power relation that is characterised by conflict and interdependence on the basis of rights that derive their validity from social practices.

It is under this perspective that we should see that values can play an important role for the support of the notion of the corporation as community that is seen as a unity based in the recognition of difference. If we manage to see the corporation as a common concern of property and labour (something that codetermination has to a considerable degree achieved) then the relation between them can be seen under a new perspective. They can far more easily cooperate on the basis of the mutual benefit of both to the continuation of the relation without this cooperation negating the aspect of their conflict. Therefore and in view of their mutual advantage, tolerance and why not solidarity towards each other may have a meaning. A meaning that however is not conditioned by an alleged common good nor by a uniform social morality but rather on the recognition of the indispensability of the contribution of each part to the satisfaction of needs and desires of the other. This approach may also give answers to issues that classical contractual solutions fail to solve in a non coercive way. For example a worker if s/he knows that s/he is respected as an individual by his/her company and knows that s/he can rely on an institutional network to which s/he actively participates then s/he may be willing to perform more than to work beyond their contractual minimum¹⁹³. In other words we see how this multileveled dialectic of employment produces a major legal paradox, a paradox that is produced from the fact that property and labour although incompatible and conflicting are interdependent. If interdependence is to produce mutually beneficial results then it has to acknowledge, recognise and integrate in its normative approach, its opposite, i.e. conflict. In this respect we can see how interdependence can be seen

¹⁹³ The oxymoron in this case is that the property side of the relation is the one that receives the surplus value of cooperation.

as the cornerstone that can provide a valid normative solution within the confines of capitalism. In other words whereas conflict pushes us away from capitalism and away from any perception that the legal system may embrace, interdependence seems to be the pole around which any normative approach should focus.

At another level, what also needs to be stressed here is that the common moral framework upon which interdependence may be used as normative principle is not something that exists somewhere in a diffuse 'social sphere' and as such should govern employment. The point of view that this thesis suggests is that this moral framework should be constantly discovered through the development of the particular dialectic of employment and not imposed on the basis of moral preconceptions. This means that we should not start from moral values as normative standards and try to impose them on employment as communitarianism does. For example, solidarity is undoubtedly a most important and positive moral value. However, we cannot regulate employment on the basis of the moral argument that solidarity should as an imperative govern employment whilst ignoring that employment apart from solidary is also characterised by the equally strong presence of non-solidary elements. This means that we cannot impose a notion of solidarity without first creating achieving an institutional framework for it to be expressed¹⁹⁴. In other words if solidarity is not to be an empty ideal we should create the mechanisms and that may create the ground for its application.

What we suggest here is that on the basis of the knowledge of the ambivalent character of employment, a character that creates tensions, contradictions, ambiguities and paradoxes at many levels, we should seek these moral principles as they themselves participate and contribute to this unique dialectic. In other words the achievement of the fulfilment of values comes as a result of the unfolding the dialectic of labour, as the result of the negotiation and the compromise of interests, desires and rationalities involved in employment. This means that values should not be seen as abstract moral ideals that have to be imposed as regulating substantive principles of the employment relation. On the contrary these values have to be the outcome of an agreement as a result of the unfolding of the unique dialectic of employment.

¹⁹⁴ Moreover, as we have shown the non-solidary elements cannot be eliminated and as this thesis has argued should not be suppressed. Therefore, solidarity in the case of employment should mean the convergence of conflicting parts on the basis of the agreement of the attainment of a common purpose. However, this can only be achieved if we have a normative approach that recognises the corporation, the field of employment as a locus where the divergence and conflict of the parts have to converge on the basis of their interdependence.

Moreover, as we have suggested here is that in view of the conflictual character of employment we cannot have an *ab initio* agreement on these values. On the contrary what we have done is to put forward an argument that says that in view of the human and social character of labour, the legal regulation of employment cannot ignore valid social perceptions as to the justice of the practice and of the distributional outcome of employment. However, these perceptions as evolving in their dialectical opposition to equally valid ones (for example, we can see an antithesis between the demand of social justice as opposed to the demand economic growth and prosperity, as for example a neo-liberal would moralise it) have to be constantly negotiated and renegotiated. And it is the presuppositions of this negotiation that we are trying to develop here.

5.6. *Community and private government. A Summary*

What has emerged from our analysis so far is that the corporation must be seen as a community. However this does not deny the fact that this community is a system of organised power that through its institutions recognises and mediates between the diverging interests and discursive rationalities that exist and interact within it. Nonetheless it should not be forgotten that pluralism and democracy are ways of controlling power and not of abolishing it.

This means that neither pluralism nor industrial democracy can deny the fact of domination of property over labour. What they achieve is the social re-contextualisation of the power and authority of property over labour. Through the recognition of the validity of all the interests that are invested in the corporation this authority has to be in correspondence with the values that are either imported through labour or derived through its dimension as a responsible social actor. Here we see again the need for a normative approach that perceives the corporation not as a private concern but as a public body. It is in this context that we can see the recognition of interests as bearing rights in the corporate order. The corporation has to recognise the fact that labour is as much as an economic as a socially determined action and employment a socially determined as much as an economically significant relation. What this leads us to is that the political organisation of the corporation allows us to understand the validity of its internal procedures as deriving from a socially valid

perception of legal rationality as adapted to the problems that the nature of employment creates. It is in this sense that at corporate level we can have a more responsive approach to the normative problems of employment rather than the direct regulatory approach of state law. As socially conditioned industrial rights focus on the continuation of the relation within an acceptable social context. In the corporate context and drawing an analogy with citizenship it is the notion of membership that provides the basis for the mutual recognition that of rights on the basis of a collective identity. However, as we have seen identity does not mean homogeneity. On the contrary it provides a ground for the negotiation of divergence. In other words industrial democracy re-establishes a balance between property and labour but at a level and with a rationality quite different to that of the welfare state. Industrial democracy should not stifle conflict as expressed through employment. On the contrary it should function on the basis of its recognition. It is an expression of social autonomy that through the recognition of conflict negotiates the terms of its symbiosis. However, despite our critique to the welfare state it should not be forgotten that no notion of industrial democracy can materialise without active institutional support. The role of the state as a mediating factor is indispensable in the sense that only it can provide a pole of power that can condition that of property. In other words we find again here the strategic alliance between welfare states¹⁹⁵ and organised labour. However in this case the welfare state does not aim at unilaterally shaping the content of employment but although in this case the welfare state does not aim at the determination of the content of employment but rather empowers labour so that it can be (albeit the repressed one) a pole of the dialectic that forms the ever evolving content of employment in modernity. However, recent developments in the economy at global level are threatening the recognition of labour as the other pole of the dialectic of employment. This brings us to the transformations that globalisation has brought. 6. A footnote on Globalisation and Employment.

¹⁹⁵ See chapter 3, section 4.2.2.

6. Multinational Corporations and Contractual Networks.

A last Comment on the Dialectic of Labour

Globalisation is assumed to be a trend that has forever altered our understanding of employment. In what concerns the main focus of critique of this thesis, I maintain that it has not. What I am going to argue next is that globalisation has done nothing of the sort. On the contrary what we are going to see next is how this trend has radically shifted the balance in the power relation of employment without however affecting its substance.

6.1. The multinational company as employer

It is a well-known fact that the globalisation of the economy has brought about an unprecedented mobility of capital. It is this mobility of capital that dramatically empowers property in its confrontation with labour. It provides it with the ability to move its operations to any place that provides the most attractive investment environment for it. This attractive environment could mean amongst others the availability of a cheap workforce and the existence of capital friendly employment laws. This ability of capital has as an effect that it unbalances traditional patterns of work in the countries that it 'invades'.

The fact that the corporation operates in many different countries means that it has to adapt its operations to different legal systems. There are mainly two ways, actually complementary to each other, for avoiding the problem that they have to adapt their operations to different institutional environments. The most common method for avoiding the complications that ensue from such a situation is that the multinational corporations develop a very cohesive internal normative code that harmonises the normative framework of their internal operations in partial insulation from state legal systems¹⁹⁶. This development seems at first sight to enhance the autonomy of private government systems. However, this has not at all been the case so far. We have seen that private government systems depend on the existence of a

¹⁹⁶ See Robe (1997) pp.52-62, 67.

relative balance of power between capital and labour. In the case of multinational corporations this balance is dramatically shifted in favour of capital. In the globalising economy capital has used its mobility as an instrument for the attenuation of the strength of collective organisations. In a work system where capital is global but labour is tied to a locality, capital may move its operations to any place that is more attractive for it to invest thus emancipating itself from its dependence from any specific labour market¹⁹⁷. In this way we have a major alteration in the balance of the power relation between property and labour. Capital derives its power from its resource holding ability. Labour on the contrary through collective organisation. However, experience has shown collective organisation in order to be effective has also to establish itself as a source of political influence. This requires the existence of effective pressure mechanisms and access to a stabilised and favourable to them political environment. In the case where the multinational corporation moves its operations around the globe these weapons that labour has created for itself are lost.

Quite often we have the situation where workers are being faced with the dilemma to either accept terms and conditions of employment or lose their jobs due to the reallocation of its operations to another place. The responses that labour has to this advantage of capital are limited. In the case where a trade union threatens the multinational with industrial action the multinational can simply close the factory and establish it elsewhere. Of course, this is not something that happens every day, but is an indication that corporations can easily move (and the trend is that they are actually doing so) their operations to countries where labour is cheap and disorganised. Additionally, this means that the determination of wages and working time is more and more left to the discretion of management. Even the more so, the insulation of the normative order of the enterprise from state law, means that in third world countries where this model is becoming very common, workers can easily be left outside the scope of statutory protection.

This of course does not mean that the multinational corporation has completely prevailed over labour. However, it means that labour is in a detrimental position in the internal organisational system, since management have attained through globalisation a strategic advantage over them. The problem lies in the ability of the strongest part, in our case management to unilaterally impose it will. In J. Alteson's words: '*Unions*

¹⁹⁷ See Beck (2000) pp. 27-28.

find themselves dealing increasingly with conglomerates and multi-national corporations that can more easily weather economic struggles, conceal information, and transfer, or more credibly threaten to transfer work to other locales, or, indeed, other countries than could their predecessor counterparts' ¹⁹⁸.

The second way multinationals deal with legal systems is to try and influence them in their favour. This means among others pressure upon international organisations to introduce pro-capital labour regulations, codes of practice and upon governments to introduce legislation in that direction¹⁹⁹. As Third World countries are in need of their investments, they are amenable to their pressure. Under these circumstances it seems imperative that the law should intervene and focus on the issue of the containment of the social power that multinational corporations are acquiring. However, as multinationals operate in many countries there is a need for the harmonisation of national legal approaches. Nevertheless, the convergence of legal culture in international level and the increasing importance of International Organisations make such a task feasible.

On another level, the consequences of the globalisation of capital for the private government system are devastating. We have seen that multinationals establish internal normative systems, but in this case we may talk of an internal normative order of the corporation but we cannot possibly talk about a private government system. In this case (especially in the absence of strong trade unions and of collective bargaining) labour has not a recognised interest in the corporation. Even the more so, since multinational enterprises have used their mobility to overcome the obstacle of collective organisation. As C. Craypo has shown, in multinational corporations, management have the upper hand and have used it in order to diminish the strength and the influence of collective organisation²⁰⁰. We have said that in principle management are opposed to collective bargaining. In the age of global capitalism they seem to be in a position where they can simply avoid it. As the trend appears to be deploying, it seems that labour lacks the mobility, the resources and the organisational capacity, to confront capital as effectively as it did during the 20th century. However, the direction that the world work system will take, I believe, depends basically on the ability of labour to use the potential for mobility and flexibility provided by the

¹⁹⁸ See J. Alteson (1985) pp. 841-842.

¹⁹⁹ On the issue of multinational enterprises as law making communities see P. Muchlinski (1997)

²⁰⁰ See C. Craypo (1975) p. 3, 7.

technological advances to its advantage. This will depend on its ability to create a new basis for solidarity that will allow it to adjust collective organisation to the challenges of the global society.

6.2. New forms of organisation of employment

This new situation combined with the emergence of new organisational forms of employment. Contractual networks²⁰¹, franchises and new forms of employment such as home working and tele-working create new condition of work that allow employers to avoid both collective organisation but moreover labour protection legislation²⁰². Some claim that the notion of subordination and control is in these cases is gradually being replaced by a new form dependency that has been termed as neo-feudalisation²⁰³. The term denotes that networks that have adopted a non-pyramidal form of organisation demand from their employees their initiative as well as their loyalty to an unprecedented degree²⁰⁴. We can see the resemblance with vassalage in the sense that this kind of loyalty implies the conscious undertaking of action for the benefit of another to whom the person is dependant as to his/her well-being. In this respect we can say that domination through employment takes another form. In these cases it becomes not directly confrontational but rather is based on consensual dependence. What we may say is that we have through these patterns is a new ideological perception of domination since they imply the attachment to the interests of the employer as if they were ones own. In this respect we have both a practical but moreover an ideological advantage of property over labour. However the substance of domination as it stems from the relation between property and labour remains unaltered. We do not have here an alteration to the relation but rather a change in its balance that in this case has shifted in favour of the property side of it. What moreover should not be forgotten is that these trends although expanding they do not suggest that the traditional model of subordination and control has been surpassed. On the contrary this new form of domination exists alongside the old one. Moreover, as against these new forms of employment we have not yet have an organised reaction

²⁰¹ For contractual networks see Teubner (1993b) (2000b) (2003/2004a)

²⁰² See Collins (1990a) p.360 ff., (1990b) p.744.

²⁰³ See Supiot (2000) pp.342-343.

²⁰⁴ Ibid. p. 342.

especially in what concerns their social consequences. As I believe that as these new patterns are by their nature inimical to collective organisation the reaction will come in reference not so much from employment itself but rather from a society that sees its structures of reproduction being unsettled by the demands of the economic discourse²⁰⁵. In other words globalisation alters the form of the expression and the balance of the ambiguities and tensions of employment. It does not alter their substance and it does not eradicate them. In the first instance we have a significant advantage of one part over the other through its unprecedented mobility. In this respect the other part has to find the resources and the new sources of solidarity in order to be able to react. In the second instance we have a dislocation of the field of confrontation between property and labour. It is not anymore the integrated corporation the field of struggle but rather the competing claims of the economic and the social discourses over the content of employment. However and this should be remembered that it is the structure of employment (the capitalist mode of production as Marx would have it?) that produces these tensions. And this structure that stems from the relation of labour to property (capitalism in other words) is not altered by globalisation. On the contrary is confirmed in a most emphatic way in its aspect of domination. In other words the dialectic relation as a power relation between property and labour has shifted its balance towards the strongest part, namely property. Our point here is that we have yet another reading another shift in the dialectic between property and labour that nonetheless cannot alter its substance as a power relation of conflict and interdependence.

7. By Way of Conclusion. The Community and the Insoluble Paradox of Employment

This analysis brings us back to our findings at the end of chapter one: on the institution of a community through employment as an interaction system and on the political character of this relation. On the basis of our analysis so far we can say that this community is constituted at all social levels and cannot be surpassed by perceptions that ignore the complexity of the relation as one of conflict and

²⁰⁵ Beck (1992) especially pp. 127-138.

interdependence. What we mean by this is that this relation is expressed at the micro social level as between an employer and an employee that is expressed as relation of domination that ensues in a continuing dialectical relation of conflict and interdependence. We can see now how on the meso-level we have the institutionally organised community of the corporation, as a multileveled relation between conflicting yet interdependent forces, discourses and rationalities. Additionally we have seen that this community is mediated by relation between labour and property as social forces that are mediated by the compromise between the market and the welfare state that in a competitive way attempt to determine the substance of the relation according to their respective rationalities.

In this respect we can see the understanding of this community by diverging paradigms that compete as to the determination of the substance of the relation. Liberalism and libertarianism deny the existence of any form of community under the figment of employment as free economic exchange. The welfare state acknowledges this community but suppresses its conflicting dimension. We can see now how these perceptions compete and find their expression in competing paradigms as to the determination of the practice of employment as organised in the corporation. On the one hand the contractual nexus paradigm denies any associational dimension on the corporation. With rationality quite similar to that of the welfare state the institutional theory especially in its communitarian version reveals the community of employment. In its most fruitful contribution that is Selznick's '*Law, Society and Industrial Justice*' communitarianism has allowed us to see the organisational dimension of employment. Moreover this organisational dimension of the corporation brings us back to our findings as to the dependence of property on its social recognition. Organisational logics of employment are based on the notion of the corporation as a public institution that has as its *raison d'être* its social contribution. In it as the case was with the Hegelian state property cannot develop its own logic unfettered. It is socially conditioned by the notion of the common good. The corporation in this respect becomes a social locus where diverging rationalities intersect and interact on the basis of their contradictory relation of conflict and interdependence. As we have repeatedly said, this contradictory relation cannot be transcended as long as capitalist property relations persist. This has led us to look for employment as a relation that is constantly negotiated on the basis of a community that regulates and recognises conflict as a structural condition of employment. As a result employment relations have to assume

a form of a constant negotiation under the institution of collective bargaining, an institution that is pervasive at all levels of employment and encapsulates its contradictory nature. Collective bargaining brings the diverging rationalities of employment under a condition of constant negotiation. Of course this condition cannot negate the nature of employment as a relation of social domination but at least it can empower labour as a social force to lay a claim on the fruits of social wealth on the basis of its indispensable yet silenced role as a most important expression of social human creativity. In this respect we have an ever-evolving relation that at any social level cannot be transcended in our historical horizon as to its contradictory nature. It is in this respect that we can see employment as having a character that is political in its nature. The political character of employment is not derived by the similarities of its organisation to that of a political community. It mainly has to do with the continuation of a relation of an integrated whole that in a deliberative way negotiates its differences and conflicts on the basis of the interdependence that is mediated by the existence of a collective identity. Moreover this negotiation is based on the recognition of divergence of interest and moreover on the creation of an institutional pattern that guarantees the continuation in time of the relation. In other words the similarity lies in the pluralistic and deliberative negotiation of difference on the basis of perpetuity. We have found a most fruitful paradigm in the case of codetermination where we encountered a mode of negotiation that through the recognition of conflict it creates a normative web that derives its legitimacy from the actual and specific practice of employment. As we have seen the importance of codetermination is that it addresses these problems and creates law, in the sense of the conferment of rights and the assumption obligations from at 'lowest' level of employment. Moreover, we have seen codetermination as a form of negotiation of the structural ambivalence of employment and of the tensions that it creates. Codetermination is a most valuable institutional approach in that it provides us with a paradigm that attempts to integrate the interests of property and labour on the basis of their interdependence whilst recognising their conflict. Moreover it has made clear that the content of employment is an issue that is constantly contested and negotiated.

This means that all efforts to subsume it under one-dimensional descriptive schemata that project just one aspect of the relation as determinant ignore these tensions that provide the character of the employment relation in modernity. What we mean by this is that we do not project an image of employment that claims that it has

provided an absolutely exact description of it. Far from it. On the contrary we say that its political character can best express its contradictory nature. It is not an authoritative cognitive definition on the basis of which employment should be regulated. It is just a perpetual schema that refuses definitions of employment as a relation that has to subsume into authoritative logics whether these come from the market or from the state. On the contrary we strongly believe that employment presents us with a paradox that cannot be comprehended in all its complexity by the legal system. What we suggest here is a reading that understands employment exactly as an ever-evolving paradox. Moreover, employment is not just legal paradox²⁰⁶. It is a paradox of the outmost social significance that assumes a legal form and thus becomes a legal paradox exactly due to its significance. The market and the regulatory approach have attempted to suppress the paradox by projecting dimensions of the relation that they consider as dominant. What we have showed is these perceptions suffer from fundamental cognitive flaws that ignore the ambivalent nature of employment. However, regardless of its dominant social perception this ambivalent nature persists and receives contradictory definitions by the legal system. And as Luhmann remarked paradoxes may be suspended or even repressed but cannot be eradicated. They are paradoxes exactly because they express relations that cannot be grasped by dominant cognitive schemata. As such '*paradoxes have a fatal inclination to reappear*'²⁰⁷.

We have described employment as a relation that creates ambiguities and tensions that lead to a legal paradox. What should not be forgotten is that employment is not a static relation. It constantly changes as its determining factors evolve in relation to each other in a dialectic that is expressed as a power relation between a socially dominant and a socially repressed social force. This means that its actual content is constantly evolving on the basis of this dialectic, constantly evolving, constantly adapting to the power structure and the strategies of the parties involved and reproduces itself productively on the basis of this ambivalence. And it is exactly this evolution that we should allow to be developed.

It cannot be denied that this thesis has taken an overt stance in favour of labour on the basis of its creative power. In this we accept the responsibility for an implied value judgement as to the way in which the paradox of employment should be

²⁰⁶ See Teubner (2003/2004b) on legal paradoxes and on their creative potential.

²⁰⁷ Luhmann (1988) p.156

addressed. This thesis holds that the paradox of employment can be productive as long as the creativity of labour expresses itself through the different guises and forms that employment takes. This can be achieved only if society, as a labouring society reclaims the rights that its creativity bestows to it. In other words the evolution of employment should be deemed as productive to the extent that it can give back to the realm of social needs and desires what it has itself produced for the economic system. And this can be achieved through the empowerment of the discourses through which labour receives its legitimacy. In other words we accept the paradox, we reject authoritative perceptions of the paradox and we want it to express itself as authentic social relation in the direction of social empowerment through the creativity of labour. In other words the question that confronts us now, but which we can pose rather than answer, is how by acknowledging the contradictory nature of employment can we rediscover and realise the creative force that labour is for humanity.

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